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**The ‘rule of the recognised helm’:
How does European Union membership
impact upon UK Parliamentary sovereignty?**

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A thesis presented for the degree of Doctor of Philosophy (PhD)

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Abstract

This study examines the way in which European Union (EU) membership has impacted upon historically preceded understandings of UK parliamentary sovereignty. The position adopted is critical of other approaches within a neo-Diceyan, popular sovereigntist and common law paradigm which have accorded too little significance to the past historical precedents defining Parliament's sovereignty and its institutional inter-relationships. By overlooking historical constitutional forms, the gravity of the impact of EU membership on the UK constitution has often been misunderstood by those approaches.

By adopting a broadly political constitutionalist position, the thesis proposes an alternative explanation of UK parliamentary sovereignty as the 'rule of the recognised helm'. It seeks to achieve that objective by adapting the approaches of the 'rule of recognition' while incorporating the medieval, political view of sovereignty as operating under the 'helm' of the ship of state, responsible for the government of the realm. The thesis establishes that the operation of the 'rule of the recognised helm' is dependent upon a uniquely conditioned political history characterised by eight crucial historically preceded 'historical constitutional forms' defining UK parliamentary sovereignty, from the thirteenth century through to the contemporary Parliament.

The main contention is that under EU membership, successive governments, through Parliaments, have adopted practices which whilst preserving the fundamental rule, are at odds with those past constitutional precedents. Three key EU case studies – of the Financial Transactions Tax, of the freedom of movement of persons and of the Working Time Directive – are employed as evidence that the UK's helm of state has, since 1973, incorporated EU institutions which *unsettles* those political precedents of parliamentary sovereignty. On the other hand, the fourth case study, of Parliament's place since the UK's holding of the EU Referendum in 2016 constitutes a new constitutional resettlement, a realignment of Parliament with historical precedent and its sovereignty.

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I would like to thank my long-term employer, the Member of Parliament for Stone, Sir Bill Cash for his unrelenting insistence that the fundamental issue that lies at the heart of UK parliamentary sovereignty is the democratic freedom of choice at the ballot box by the voters of the United Kingdom to decide the laws under which they are to be governed and to answer the question of ‘Who governs?’ Notably, his chairmanship of the House of Commons’ European Scrutiny Committee and 2010 inquiry into the then European Union Bill, including the attempt by the then Government to place on a statutory footing the ‘common law principle’ of parliamentary sovereignty in relation to EU law motivated me to write this thesis.

Finally, I would like to thank those who I hold very close to me for their personal support – my wife, Sarah, my parents, Patrick and Bernadette, and to Helen and Thomas, Sheila and all my family – mainly for putting up with me.

TABLE OF CONTENTS

| | |
|--|-----------|
| Abstract | 3 |
| Acknowledgements | 4 |
| Chapter 1: the impact of EU membership on the UK's governing competences and parliamentary sovereignty | 10 |
| UK membership of the EU | 11 |
| EU membership impact on UK governing competences | 18 |
| The EU challenge to parliamentary sovereignty | 23 |
| Research questions | 25 |
| Setting boundaries | 26 |
| Thesis overview | 28 |
| Chapter 2: the meaning(s) of sovereignty, parliamentary sovereignty and the 'rule of recognised helm' | 36 |
| The five principles of the meaning of sovereignty | 39 |
| The meaning of Parliamentary sovereignty: the right to make or unmake any law | 43 |
| The meaning of Parliamentary sovereignty: the 'rule of recognition' | 47 |
| The meaning of Parliamentary sovereignty: the 'rule of recognition' and the contemporary British state | 50 |
| The meaning of Parliamentary sovereignty: the 'rule of recognition' and the common law | 52 |
| Political constitutionalism: returning to the rule of the recognised helm | 56 |
| Chapter 3: The eight historical constitutional forms defining the rule of the present day 'recognised helm' | 61 |
| The making of the present: historical transitions in constitutional conventions and form ... | 66 |
| Constitutional form one: 'What the Crown-with-magnates enacts is law' (1200-1350) | 66 |
| Constitutional form two: 'What the Crown-with-Commons enacts is law' (1350-1532) | 69 |
| Constitutional form three: 'What the Crown-through-Parliament enacts is law' (1533-1602) | 71 |

Constitutional form four:

‘What the Crown-with-disputed Parliament enacts is law’ (1603-1687)..... 73

Constitutional form five:

‘What the Crown-in-regulating Parliament enacts is law’ (1688-1689) 75

Constitutional form six:

‘What the Crown-in-mixed constitutional Parliament enacts is law’ (1690-1790s) 77

Constitutional form seven:

‘What the Crown-in-Parliamentary Cabinet enacts is law’ (1800-1972)..... 80

Constitutional form eight:

‘What the Crown-through-Parliamentary political elite with external bodies enacts is law’ (1973-present) 82

The making of the recognised helm: placing present hands on the wheel..... 84

Chapter 4: Parliamentary sovereignty, the precedent of the mixed constitutional model and the UK’s membership of the EU..... 101

Parliamentary sovereignty and the historical mixed constitution 102

Parliamentary sovereignty and the contemporary mixed constitution..... 105

Parliamentary sovereignty and the contemporary mixed constitution under EU membership: the case of the Financial Transactions Tax (FTT) 113

Changing the inter-related pragmatically organised, partial separation of powers 114

Judicialisation of the parliament-sanctioned executive..... 117

Enhanced cooperation over indirect taxation, the absence of parliamentary consent and executive-legislative fragmentation..... 118

The rule of the recognised helm preserved?..... 123

The fracturing of executive-legislative relations – the open door for parliamentary and popular political campaigns 124

Tax-collecting powers diluting the basis of mixed government through non Westminster-delegated authority 127

Conclusion 128

Chapter 5: Parliamentary sovereignty, collective representation and EU membership 131

Parliamentary sovereignty and historical collective representation by Parliament 133

| | |
|---|------------|
| Parliamentary sovereignty and contemporary collective representation by Parliament | 135 |
| The challenge of popular sovereignty approaches to representation | 136 |
| The challenge of the traditional party government model | 139 |
| Parliamentary sovereignty and contemporary collective representation by Parliament under EU membership: the case of the Working Time Directive | 142 |
| The impact of the Working Time Directive upon the UK's social and employment law and the UK constitution..... | 143 |
| Westminster's collective representation versus neo-corporatist, functional representation..... | 144 |
| Supranationalist representation | 149 |
| Representation through constitutionalisation..... | 150 |
| Competitive partisanship and party government | 152 |
| Conclusion..... | 158 |
| Chapter 6: Parliamentary sovereignty, the EU free movement of persons and the precedent of fundamental rights provision..... | 160 |
| Parliamentary sovereignty and historical fundamental rights provision | 162 |
| Parliamentary sovereignty and contemporary fundamental rights provision..... | 164 |
| Constitutional state theory and the entrenchment of codified rights | 165 |
| From Treaty- to Convention- to EU-rights: claimable legal rights preceding parliamentary sovereignty..... | 167 |
| Common law constitutionalism and the entrenchment of rights | 172 |
| Political constitutionalism: a response to constitutional state theory and common law constitutionalism | 173 |
| The shared deferral approach to fundamental rights | 176 |
| Democratic parliamentary majorities as guarantors of fundamental rights and parliamentary sovereignty..... | 178 |
| Parliamentary sovereignty and contemporary fundamental rights provision under EU membership: the principle and qualification of the free movement of persons | 180 |
| The right to freedom of movement of persons – the qualifications..... | 182 |

| | |
|---|------------|
| The impact of the EU fundamental right to free movement upon the UK fundamental rights scheme and the UK constitution..... | 184 |
| The judicialisation of the freedom of movement of persons..... | 184 |
| The non-negotiable right and the ‘fencing off’ of politics | 186 |
| Parliamentary sovereignty and the shared responsibility for rights provision | 187 |
| Parliamentary sovereignty, the free movement of persons and the House of Commons majority..... | 190 |
| Conclusion | 192 |
| Chapter 7: A further resettling? Parliamentary sovereignty following the EU referendum | 194 |
| Resettling the historical precedent of ultimate parliamentary decision-making power..... | 196 |
| The principle of leaving the EU under the 2016 EU referendum | 198 |
| The constitutional precedent of referendums | 201 |
| The 2016 EU referendum and Parliament resettling the UK’s relationship to the EU | 203 |
| Parliamentary sovereignty and resettling the contemporary power of Parliament | 206 |
| The ultimate decision-making power of Parliament over political decisions | 206 |
| Constitutional state theory, common law constitutionalism and the undermining of parliamentary decision-making power | 207 |
| Political constitutionalism: addressing the vacuum in explaining parliamentary power..... | 210 |
| Parliamentary sovereignty and the contemporary resettling of parliamentary power under EU membership: the principle of leaving the EU under the 2016 EU referendum . | 213 |
| Before the referendum: Prime Ministerial EU renegotiation as marginalisation of Parliament’s sovereignty | 215 |
| Parliament’s resettling of its sovereignty: legislating for a referendum through the European Union Referendum Act 2015 | 219 |
| Voters on 23 rd June 2016: directly tasking Parliament to resettle its ultimate decision-making powers to ‘leave the EU’ | 220 |

| | |
|---|------------|
| House of Commons resettling of its sovereignty: triggering the Article 50 negotiations | 224 |
| Conclusion..... | 225 |
| References | 231 |

Chapter 1: the impact of EU membership on the UK's governing competences and parliamentary sovereignty

The transition of Britain to its modern, post-war democratic form after two World Wars and the drawing to an end of an Empire brought about some significant changes to its political arrangements. It remains a 'settled polity' and it has been a full democracy for the past 100 years (Gamble, 2016). Internally, within Westminster, Parliamentary sovereignty remains the supreme principle of the UK constitution. It makes Parliament the supreme legal authority in the UK, which can create or end any law; in that system, Acts of Parliament cannot traditionally be challenged in the courts. The Westminster system has been deeply embedded in the idea of accountability, which made it possible for the electorate collectively to hold the government of the day to account (King, 2015, p. 19). The constitution as a whole continues to be expressed as "partly written and wholly uncoded" (UK Parliament, 2017). Its representative institutions and political traditions stretch back to the seventeenth century (Gamble, 2016).

Britain's place in Europe has formed, for many, a substantial part of its new post-imperial role. The role for Britain in Europe was ambiguous and difficult to express. To establish that role, politicians in Parliament passed the European Communities Act 1972, enabling the UK's entry to the European Union (EU) in 1973. It voluntarily limited the application of its parliamentary sovereignty. This and other laws reflected major political developments both within and outside the UK since the 1970s. Those laws include:

- the devolution of powers at Westminster to bodies like the Scottish Parliament and Welsh Assembly;
- the introduction of the Human Rights Act 1998 incorporating the European Convention on Human Rights into UK law;
- the decision to establish a UK Supreme Court in 2009, which ends the House of Lords function as the UK's final court of appeal.

With those changes, the UK has become less united by the activities of its multinational state than it was in the past. It has moved from being the most centralised state in Europe towards a more devolved system where the other nations of the UK are no longer subordinate to London, Whitehall and Westminster for their policies (Gamble, 2016).

Under EU arrangements, the constitution is potentially shifting away from the traditional Westminster model, in which ministers in government continue to lead their Departments

through the executive and propose and draft Government bills for the UK population, with the consent of the House of Commons. With the Human Rights Act 1998 and the incorporation of the European Convention on Human Rights into UK law and the decision to establish a UK Supreme Court in 2009, it has widened the scope of a judiciary only previously required to give effect to the statutes of Parliament. Inside Westminster, the same two major parties, the Conservatives and Labour, who were the major parties in 1945, are still the same major parties (Bogdanor 2011), run along adversarial lines (King, 2015, p. 18). As a subject, Europe split both of the major parties. For example, the Labour Party, in the 1980s, with a breakaway party of the Social Democratic Party; and then the Conservatives significantly in the 1990s. Recent events have highlighted how uneasy a subject it continues to be, including the holding of the EU Referendum of 2016, the majority vote to ‘Leave’ in that referendum, in addition to the vigorously scrutinised Article 50 and ‘exit’ negotiations being pursued under a Conservative Government. Britain had long failed and continues to dispute reconciling itself with being in Europe (Bogdanor, 2011), neither being *of* Europe, nor run *by* Europe (Gamble, 2016).

UK membership of the EU

Britain’s contemporary EU membership impacts upon its governmental competences only in so far as the EU has specific exclusive, shared, supporting or special competences to pursue certain actions or laws, in accordance only with the UK having shared or pooled those fields of legislative competence in certain policy areas through successive European treaties. It was to be the “most intimate and intense involvement” of foreign governments in the making of governmental decisions (King, 2015, p. 25). In the post-war European political and economic landscape, the European Coal and Steel Community (ECSC), formed from a Treaty, possessed supranational characteristics with the objective of creating interdependence through a common market of coal, coke, iron ore, steel and scrap so that one country could no longer mobilise its armed forces without others knowing, which eased tensions after the Second World War (European Union, 2014; Nugent, 2006, p. 138). Britain was not a signatory to the Treaty establishing the European Coal and Steel Community, which was signed by six countries (France, West Germany, Italy, Belgium, Luxembourg, Netherlands) on 18 April 1951. Later in the 1950s, Britain remained absent from signing the Treaties of Rome on 25 March 1957 with the objective to set up the European Economic Community (EEC) (and the European Atomic Energy Community, or Euratom). The European Economic Community marked an extension of European

integration to include general economic cooperation – which included the guidelines for establishing a common market in manufactured goods and a Common Agricultural Policy (CAP) (Dedman, 2010, p. 82). It embodied a degree of supranationalism in decision-making (Nugent, 2006, p. 47) and again, Britain was not a signatory to the European Economic Community at that point. Britain was in general, opposed to a continental European Economic Community, particularly through the establishment of supranational European institutions, and potentially detrimental to her export interests and undermining her claims of leading Europe (Berger, 2013).

The intentional limiting of national sovereignty by Treaty for the purposes of enabling international cooperation was in line with a number of constitutional provisions set up after the Second World War (Chalmers, 2013, p. 5). In spite of Labour and Conservative Governments having no intention of being part of a supranational European organisation (Geddes, 2013, p. 47), and during the time of the UK's original decision not to be part of the Treaty of Rome, it became recognisable to both Britain's leaders and people that economically the European Community was doing far better and being on the outside while high tariffs were "enormously disadvantageous" (Geddes, 2013, p. 56; Wall, 2008; King, 2007, p. 92). Against the British favoured intergovernmental regional trade organisation, the European Free Trade Association (EFTA), the EEC "became the predominant organisation" (Geddes, 2013, p. 53). A further Treaty, the merger Brussels Treaty, was signed on 8 April 1965. It led to the creation of a single Commission and a single Council to serve the then three European Communities (EEC, Euratom, ECSC) and was later repealed by the Treaty of Amsterdam.

In the meantime, the UK submitted its first application in 1961 to join the EEC, under Conservative Prime Minister Harold Macmillan, but the application had been vetoed by the French President, Charles de Gaulle (Geddes, 2013, p. 54). The UK made a further, second application in 1967 under Labour Prime Minister Harold Wilson but had been blocked again by the French President. Shortly after, a Conservative government was formed in Britain under Prime Minister Edward Heath in June 1970. Heath had been seeking for the right terms to be negotiated on the European Economic Community and committed the UK to join in its long-term interest (Norton, 2011, p. 55). It was eventually the European Communities Act 1972 under Heath which domestically permitted the UK specifically to join the European Economic Community. The UK required the European Communities Act 1972 in its own domestic law in order to become a member. A series of significant, new treaties and treaty amendments to the European Communities Act have

been agreed since that Act and the changes in UK law necessary to give effect to the new treaties have been made under amending Acts. The result of the European Communities Act 1972 was that future Parliaments were, unless and until they expressly repealed it, bound by its terms. Politically, the original European Communities Act 1972 received public endorsement through a post-ratification referendum in 1975, with a two-to-one vote in favour of continued membership on a 64 per cent turnout (Geddes, 2013, p. 65). The UK only joined, along with Denmark and Ireland, the European Communities on 1 January 1973, raising the then number of member states to nine.

It was not until the 1980s that the Single European Act (SEA) entered into force (1 July 1987), with the intention of deepening European integration. The Act sped up decision-making in preparation for the single market to be established by December 1992 and reforming the institutions in preparation for new members joining. It permitted the strengthening of EC institutional structures through the extension of qualified majority voting over all internal market legislation in the Council – thereby undermining any one country’s veto over proposed legislation – and the creation of co-operation procedure to give the European Parliament more influence (European Union, 2014; Geddes, 2013, p. 70; Dedman, 2010, p. 114-5; Wall, 2008, p. 49; Nugent, 2006, p. 81). But the British view that the Single European Act sufficed to ‘complete’ the single market, and that further treaties were not required simply did not prevail in reality (Marshall, 2013, p. 17). Treaty revision subsequently became a “virtual non-stop process since the mid-1980s” (Dedman, 2010, p. 166).

Less than five years later, when the Treaty on European Union (TEU), popularly known as the Maastricht Treaty, was signed on 7 February 1992 and entered into force on 1 November 1993, its objective was to prepare for European Economic and Monetary Union (EMU) and introduce elements of a political union, including political features of citizenship and a common foreign and internal affairs policy. It established the “European Union” and introduced the co-decision procedure, giving the European Parliament more say in decision-making (Bux, 2017; Hix and Høyland, 2013, p. 172). New forms of cooperation developed between the UK and other EU governments, for example on defence and justice and home affairs (Novak, 2017; European Union, 2014). The Treaty itself was a milestone on the road to a potential federation (Gowland et al., 2010, p. 118) and the UK’s political debate over the Maastricht Treaty demonstrated that popular and parliamentary groups increasingly contested the Crown and Parliament’s powers assenting to the competences set out within the European Treaties. Accordingly, the UK’s

Conservative government under John Major secured two significant opt-outs on the Maastricht treaty, including on deferring a decision on participating on the final stage of economic and monetary union (EMU) and the Social Chapter (Gowland et al., 2010, pp. 103-4).

Later, under Tony Blair's New Labour government, when the Treaty of Amsterdam entered into force on 1 May 1999 (Novak, 2017), its purpose was to reform the EU institutions in preparation for the arrival of future member countries. It increased the use of the co-decision voting procedure. The EU's absence of appetite for reform at this stage reflected the reaction to Maastricht and its quest for deeper integration (Gowland et al., 2010, p. 151). It extended qualified majority voting, with national vetoes remaining only for a small core of articles (Dedman, 2010, p. 173). That Treaty made "sufficient progress" to enable enlargement to occur in 2004, and 2007, but it was clear "even before the ink was dry that a further treaty reform would be required" (Smith, 2012).

The EU had subsequently and painstakingly drafted a Constitutional Treaty establishing a single text document – a "constitution for Europe" – in 2004 (Nugent, 2006, p. 120-8) which was signed but never ratified. That non-ratification was, in part, a consequence of an increased division emerged between the European bureaucratic elites and citizens over European integration who had no immediate access to an EU with a significant democratic deficit (Haller, 2009). Irrespective of the popular opposition in the UK to the subsequent Constitutional Treaty "as a massive step towards the creation of a federal superstate" (Gowland et al., 2010, p. 172), and the rejection of that Treaty by referendums in France (55 per cent) and the Netherlands (62 per cent) and the proposed pledge of a referendum in the UK, the Treaty establishing a Constitution for Europe was reworked through an "amending" Treaty of the Treaty of Lisbon (see Smith, 2012; Reh, 2009).

The subsequent Lisbon Treaty was signed on 13 December 2007 with the objective of making the EU more democratic, more efficient and better able to address global problems. The Lisbon Treaty enhanced the power of the European Parliament, led to the change of voting procedures in the Council, provided a permanent president for the European Council, a new High Representative for Foreign Affairs and a new EU diplomatic service (European Union, 2014; Dedman, 2010, p. 177; Lisbon Treaty, 2007). The EU gained 'legal personality' under the Lisbon treaty, giving it rights under international law to adopt laws and Treaties. The Lisbon treaty clarified powers and competences in the Treaties. It permitted an enhanced role of national parliaments,

particularly with reference to an ‘early warning system’, whereby the national legislatures gained the right to monitor whether initiatives for EU decisions comply with the principle of subsidiarity (Neyer, 2014, p. 125; Miller, 2012; Raunio, 2009, p. 318; EU Committee, 2008). All EU Treaties are only effective in the UK by virtue of the European Communities Act 1972, which is amended by Parliament each time.

The single market is the EU’s main economic foundation (Pelkmans, 2016), enabling the free movement of goods, services, capital and labour. The trade within the single market, agriculture, environmental protection and competition policy are key areas in which the Union predominates and in which the competences of national governments have been substantially reduced or removed entirely (King, 2007, p. 107; Department for Environment, Food and Rural Affairs, 2013). In terms of the single market between the 28 European countries, the EU has become a major world trading power. The EU's economy, in terms of goods and services (expressed as GDP), is now bigger than that of the US.

The UK participates in the EU’s other main objective which is to promote human rights both internally – through the introduction of EU citizenship – and around the world. Indeed, since the signing of the Lisbon Treaty in 2007, the EU’s Charter of Fundamental Rights (annexed to the Treaty) brings all these rights together in a single text. The Charter dates back to a European Council meeting in Cologne in 1999 and agreement by Convention in 2000, aspiring for fundamental rights to be consolidated into a charter (Nugent, 2006, p. 113). The EU’s institutions and all EU governments are legally bound to uphold them when applying EU law. The Charter is indeed directly effective in the UK with supremacy over inconsistent national law, albeit it does not apply to all areas of national law (European Scrutiny Committee, 2014).

The EU launched a single European currency, the euro, in January 1999. The euro is the common currency of most (19) EU countries – the UK has, again, very significantly, opted out of the euro, but the principle of which meant the UK was not required to participate in the third stage of European Economic and Monetary Union (EMU) and consequently introduce the euro (Gowland et al., 2010, p. 103). It is notable, however, that for the EU itself, the euro, which is used every day by some 338 million Europeans, is said by the European institutions to be the “most tangible proof” of cooperation between EU countries (European Union, 2014).

The EU is a unique economic and political partnership now between 28 European member states. It possesses a unique institutional set-up. The EU’s broad priorities and direction are set by the European Council, bringing together the UK and other national

heads of state or government and the Commission President and Council President (European Union, 2014). The UK's directly elected Members of the European Parliament (MEPs) who represent European citizens are elected to the European Parliament along with those from all other member states. It is in the interests of the EU as a whole rather than of the UK alone, that objectives are promoted by the European Commission, whose commissioners are appointed by national governments. In basic terms, there are three main institutions through which the UK becomes directly or indirectly involved in EU legislation, namely: (i) the Council of the EU represents the UK and all EU governments of the member states whereby the Presidency of the Council is shared by the member states on a rotating basis; (ii) the European Commission, which represents the interests of the EU as a whole, and; (iii) the European Parliament represents the UK's and the other EU's citizens and is directly elected by them. The UK participates in EU institutions through the "Ordinary Legislative Procedure" (once known as the 'co-decision' procedure) for policies and laws that apply within the EU. In principle, the Commission proposes new laws, and the Parliament and Council adopt them. The Commission and the UK and EU member countries then implement them, and the Commission ensures that those laws are properly applied and implemented (European Union, 2014). The *acquis communautaire* is the whole body of EU law all member states including the UK must subscribe to, including the European Court of Justice decisions. Two other institutions play important roles, including the European Court of Justice which upholds the rule of European law and the Court of Auditors checks the financing of the EU's activities.

The powers and responsibilities of all of these institutions are laid down in the Treaties (see Box 1.1), which are the foundation of everything the EU does. They also lay down the rules and procedures that the EU institutions must follow. The Treaties are agreed by the Heads of Government of all the EU countries – in the UK's case, the Prime Minister – and ratified by their parliaments (and sanctioned by national populations by referendum if necessary). The highest form of law is the Treaties themselves which not only set out the "constitution of the EU" and deal with substantive issues but a number of competences which provide for rights directly effective in the UK's and all other national legal systems in the EU (Bradley and Ewing, 2010, p. 129).

BOX 1.1: The EU Treaties

- Treaty of Lisbon (signed: 13 December 2007; entered into force: 1 December 2009) provided more power for the European Parliament, change of voting procedures in the Council, a permanent president of the European Council, a new High Representative for Foreign Affairs and a new EU diplomatic service.
- Treaty of Nice (signed: 26 February 2001; entered into force: 1 February 2003) provided for methods for changing the composition of the Commission and redefining the voting system in the Council.
- Treaty of Amsterdam (signed: 2 October 1997; entered into force: 1 May 1999) provided for amendment, renumbering and consolidation of EU and EEC treaties and increased use of the ordinary legislative procedure.
- Treaty on European Union (TEU) – Maastricht Treaty (signed: 7 February 1992; entered into force: 1 November 1993) provided for the establishment of the European Union and introduction of the co-decision procedure, new forms of cooperation between EU governments over defence and justice and home affairs.
- The Single European Act (signed: 17 February 1986; entered into force: 1 July 1987) provided for the extension of qualified majority voting in the Council (making it harder for a single country to veto proposed legislation) and; creation of cooperation and assent procedures.
- Merger Treaty – Brussels Treaty (signed: 8 April 1965; entered into force: 1 July 1967) provided for the creation of a single Commission and a single Council to serve the then three European Communities (EEC, Euratom, ECSC) and repealed by the Treaty of Amsterdam.
- The Treaties of Rome (EEC and EURATOM treaties, signed: 25 March 1957; entered into force: 1 January 1958) provided for the extension of European integration to include general economic cooperation.
- Treaty establishing the European Coal and Steel Community, the founding treaties being amended in 1973 when Denmark, Ireland and UK joined.

(European Union, 2017; Novak, 2017; Lisbon Treaty, 2007)

The EU is based on the rule of law, but the rule of law, within the EU, only exists in so far as member states and the EU acts within the powers conferred on them by the legally-binding treaties that have been approved voluntarily and democratically by all EU member states, including the UK. For example, if a policy area is not cited in a Treaty, the Commission cannot propose a law in that area, including direct taxation, health provision

in the NHS, defence and welfare. The Treaties set out supranational EU objectives, rules for EU institutions, how decisions are made and the relationship between the EU and its member countries.

EU membership impact on UK governing competences

The European Communities Act 1972, in practice, meant that EU law became part of UK law by virtue of that Act (Miller, 2015). EU law takes precedence over existing UK law, which must be amended if it is found to conflict with EU law. The Act, as amended over time, allows EU specified instruments to become part of UK law without the need for separate enactment of each and every EU instrument. In one specific section – Section 2(1) – the Act gives the authority for Treaty provisions and directly applicable secondary legislation (e.g. regulations) automatically to have legal effect in UK domestic law without further enactment (Miller, 2015). In terms of Westminster implementing EU law, in some areas, additional implementing measures are required, particularly in the field of agriculture, which for the UK means implementation by Statutory Instrument (SI). Directives and decisions which are not directly applicable can be enacted either by primary or secondary legislation in the UK.

The UK is wholly isolated in the EU in operating under the doctrine of parliamentary sovereignty and in which the constitution is interpreted as only “partly written and wholly uncoded” (UK Parliament, 2017) – all other member states have adopted some form of written constitution.

The UK Parliament is and always has been well aware that when it joined the EC:

- (i) priority would be accorded to EC law where the EU has competence;
- (ii) it was inherent in the EC regime that functionally the priority must be given to EC law;
- (iii) the European Communities Act 1972 placed a duty on national courts to override national law in the event of a conflict (Craig, 2011, p. 116);
- (iv) Parliament may still derogate from EU obligations expressly and the EU only maintains supremacy in areas of the law where it is applicable (Craig, 2011, p. 118).

Despite political controversies, or perceptions of ‘awkwardness’, the UK voluntarily belongs through the EU Treaties to the EU system of rules. The end result of the Treaties is that there is a division of competences with the EU. The Union therefore only has the competences conferred upon it by the EU Treaties. The Treaty of Lisbon sets out for the first time and very precisely, the division of competences between the EU and member states, by distinguishing between three main categories of competence:

- exclusive competences;
- shared competences, and;
- supporting competences.

In the past, there had been disputes over competence between the EU and member states and so the Lisbon Treaty set about clearly defining them. The Treaty of Lisbon ended the European Community and replaced it with the EU, and it is the EU which exercises the competences conferred upon it. The Lisbon Treaty, or Treaty on the Functioning of the European Union (TFEU), distinguishes between three categories of competence as categorised above and in brief they are as follows (Rossi, 2012).

The ‘exclusive competence’ means that the Union – and therefore not the UK or other member states – have exclusive competence in the fields of the:

- (a) customs union;
- (b) the establishing of the competition rules necessary for the functioning of the internal market, which does not relate to the UK;
- (c) monetary policy for the member states whose currency is the euro;
- (d) the conservation of marine biological resources under the common fisheries policy and;
- (e) common commercial policy.

The Union shall also have exclusive competence for the conclusion of an international agreement (Article 3, TFEU). The EU alone is able to legislate and adopt binding acts in these fields. The UK and the other member states’ role is therefore limited to applying these acts, unless the EU authorises them to adopt certain acts themselves.

The shared competence specifies that the EU has shared competence with the member states, including the UK, which applies in the following fields:

- (a) internal market;
- (b) social policy, for certain aspects defined in the Treaties;
- (c) economic, social and territorial cohesion;
- (d) agriculture and fisheries, excluding the conservation of marine biological resources;
- (e) environment;
- (f) consumer protection;
- (g) transport;
- (h) trans-European networks and;
- (i) energy;
- (j) area of freedom, security and justice;
- (k) common safety concerns in public health matters, for the aspects defined in this Treaty;
- (l) to a certain extent, in areas of research, technological development and space, and;
- (m) to a certain extent, in the areas of development cooperation and humanitarian aid and conducting a common policy (Article 4, TFEU).

The EU and member states, including the UK, are authorised to adopt binding acts in these fields. However, the UK may exercise its competence only in so far as the EU has not exercised, or has decided not to exercise, its own competence.

The EU also has ‘supporting competences’ (Article 6, TFEU). The Union has supporting competences “to carry out actions to support, coordinate or supplement the actions of the member states” on:

- (a) protection and improvement of human health;
- (b) industry;
- (c) culture;

(d) tourism;

(e) education, vocational training, youth and sport (Article 6, TFEU).

The EU has no legislative power in those fields and may not interfere in the exercise of these competences reserved for member states, including the UK.

The EU has some other ‘special competences’ in certain fields so that the UK and other member states coordinate their economic, social and employment policies within the Union. Member states whose currency is the euro are a special case within that field (Rossi, 2012: 101). The common foreign and security policy (CFSP) (under Article 24 TEU) is in an unsettled position – the EU has competence in all fields connected with the CFSP, but subject to unanimity/veto, yet it goes as far as defining and implementing this policy through the High Representative of the Union for Foreign Affairs and Security Policy, whose roles and status have been recognised by the Treaty of Lisbon. Yet, on the other hand, the EU may not adopt legislative acts in this field and the Court of Justice of the EU does not have competence to give judgement in this area.

The exception to the competences conferred by the Treaties is the “flexibility clause” (Article 352 TFEU), which enables the EU to act beyond the power of action conferred upon it by the Treaties in specific circumstances. However, the specific reduction or extension of EU competences is a step which requires a revision of the Treaties, which domestically and institutionally carries with it its own crises.

EU membership influences the UK perhaps most importantly through the provisions and consequences of the Single Market (Pelkmans, 2016), in which the EU’s ‘four freedoms’ of goods, services, capital and people are guaranteed. In terms of intra-EU migration rules, EU nationals between member states do not require a visa to enter another member state, and no time limit may be placed on their stay (under the Free Movement Directive, EU Directive 2004/38/EC). Having ceded that competence, the inability of the UK to impose limits on immigration from the EEA remains a controversial aspect of EU membership in the UK, particularly since the expansion of the EU to Eastern Europe from 2004, which has driven a rise in net migration (Thompson and Harari, 2013) and, played a significant role in the majority referendum decision of the British people to leave the EU in June 2016 (Curtice, 2017a; Sobolewska and Ford, 2016; Hobolt, 2016; Wilkinson, and Hughes, 2016).

The EU has a major exclusive competence to negotiate trade and investment agreements with countries outside the Union. It is a customs union with a common external tariff on imported goods and therefore the UK's membership of that union significantly affects the UK's trade relations with non-EU members throughout the world. The Common Agricultural Policy (CAP) affects consumer prices and membership impacts upon common external tariffs levied on imports. Single Market law seeks to eliminate the differences in the way markets function between the UK and all EU member states – or creating a 'level playing field' – including on product standards for goods, and rules on consumer protection, to health and safety legislation, and competition policy. The UK does not operate with the euro currency and is not a member of the 19-member eurozone area. By sharing a single currency, those euro area countries must also coordinate their economic and fiscal policies much more closely than other EU countries such as the UK. Nonetheless, the EU is the largest economy in the world, although constituting only 7 per cent of the world's population. The Common Fisheries Policy (CFP) is the EU's instrument for managing viable fisheries and aquaculture. Although mired in controversy for decades in the UK and which had largely "failed" as the health of fish stocks and fishing businesses deteriorated as bureaucracy increased, the CFP has been recently reformed.

In terms of the national competences over UK policy, Westminster does retain control over key areas of government – including direct taxation, health provision in the NHS, defence, welfare, and other vital areas:

- *Taxation*: Competence on direct taxation remains primarily with the UK and other member states, although by indirect taxation, the UK is subject to Value Added Tax (VAT), excise duties and other indirect taxes and other issues, including the constraints on exercising their competence in line with the fundamental freedoms (HM Treasury, 2013).
- *Public spending*: The UK's public spending is the responsibility of the Government and is expected to amount to £772.8 billion in 2016-17 ('Total Managed Expenditure') (Office for Budget Responsibility, 2017). In the meantime, its net contribution to the EU budget in 2015/16 stood at £10.8 billion (HM Treasury, 2016) while the majority of EU funding received and spent by the UK is through the European Agricultural Guarantee Fund (EAGF), paying subsidies to farmers, and through European Structural Funds (Keep, 2017; Department for Environment, Food and Rural Affairs, 2013).

- *Labour and social law*: The UK maintains, unlike some other EU members, that member states regulate their labour market and their social systems according to their own needs and political priorities (Thompson and Harari, 2013).
- *NHS*: The EU is generally limited to supporting the competence of improving health in the NHS and the EU has, for example, an extremely limited role in social care (Department of Health, 2013).
- *International development*: The EU is only one of a number of multilateral organisations through which the UK channels its aid spending. In 2012-2013, for example, the UK spent 43 per cent of its aid budget through multilateral channels (including the United Nations) to address specific issues and spends the remainder of its aid budget bilaterally (Department for International Development, 2013).
- *Foreign policy, defence and security*: common foreign security and defence policy decision-making is pursued by unanimity in the Council through member states' government ministers. Where all significant decisions are made by unanimity, each member state has a power of veto, particularly over the deployment of EU military operations and civilian missions. Each member state also retains full sovereign control of its troops, civilian personnel and other security assets (Foreign and Commonwealth Office, 2013).
- *Education*: the UK, like other EU governments, has a "strong political desire" to make its own laws regarding education and training, externally entering into other bilateral and multilateral international agreements, provided it is not precluded by overriding EU competence in other areas (Department for Education, 2014).

However, that does not mean UK parliamentary sovereignty is unaffected by EU membership. The fundamental rule in a legal and political system which is dependent on a uniquely conditioned political history has defined the sovereignty of Parliament. Under EU membership, governments through Parliaments, have learned practices at odds with past constitutional forms, while not altogether abandoning the underlying fundamental rule.

The EU challenge to parliamentary sovereignty

It is said that the doctrine of parliamentary sovereignty – or what the classical, iconic scholar of this concept, A. V. Dicey in 1885 referred to as "the very keystone of the law of the constitution" (Dicey, 1964, p. 70), is defined as:

“The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament . . . has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament” (Dicey, 1964).

Parliamentary sovereignty has, throughout the centuries, undergone major challenges and developments, which has left the UK with the Westminster Parliament it has today and another new (albeit, often similar) set of challenges. Those modern challenges – including devolution and human rights legislation consistent with the European Convention on Human Rights under the Human Rights Act 1998 and often understood generally as ‘constitutional change’ – affect parliamentary sovereignty and include the challenge posed by membership of the EU under the terms of the European Communities Act 1972 and its subsequent amendments.

Given the understanding of the challenge posed by the EU to parliamentary sovereignty, examined widely across academic literature – crossing disciplines from constitutional law, political science and philosophy – what is necessary is to interrogate that definition of parliamentary sovereignty and then ask how it is interpreted in the context of EU membership affecting that doctrine. To do so can illuminate political and constitutional understandings of the UK’s core constitutional doctrine of parliamentary sovereignty – and therefore how it has been impacted upon by EU membership since the passing of the European Communities Act 1972.

The European project began as a purely economic union, i.e. a common market as a customs union, but British reservations always existed on that very point alone, insisting that there was an obvious intention towards political union – and that supranational governance carried with it domestic consequences for the doctrine of the sovereignty of Parliament (see Geddes, 2013, pp. 24-6). For example, the earliest legal attempts to challenge UK entry into the EEC in 1971 were made on the grounds that had been recognised by some groups as an abuse of treaty-making power by the executive thereby undermining the sovereignty of Parliament (Bradley and Ewing, 2010, p. 117; *Blackburn v A-G* [1971]).

On the unique and very direct legal and political issue of the EU, there is a tension between the political exercise of the sovereignty of Parliament and the claimed supremacy of a complex EU legal and political order. The uniqueness of the EU institutional set-up,

the primacy of EU law, and of direct effect for claimable EU rights in national courts (Nugent, 2010, p. 213) characterise that order. Yet, Dicey's traditional definition provides for a principle whereby "...no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament" (Dicey, 1964). That is, in part, challenged under the European Communities Act 1972 – and as set out later under the controversial *Factortame* [1990] case law (Tomkins, 2003). The Court of Justice of the EU does have a supreme right to override or set aside the legislation of Parliament. Parliament may still disapply, override or derogate from EU obligations if it wishes (Bingham, 2010; Tomkins, 2003) and EU law only maintains supremacy in areas of the law where it is applicable, but the challenge to practical, everyday Westminster sovereignty doctrine is nonetheless present.

This study examines the way in which EU membership has impacted upon historically preceded understandings of UK parliamentary sovereignty. By according insufficient significance and weight to previous historical understandings, the gravity of the impact of EU membership on the UK constitution has often been misunderstood if not underestimated by other approaches. By adopting a broadly political constitutionalist position, and as a departure from Hart's (1997) rule of recognition, this thesis proposes an alternative explanation of UK parliamentary sovereignty, as the 'rule of the recognised helm'. It seeks to achieve that objective by adapting the approaches of the 'rule of recognition' while incorporating the medieval, political view of sovereignty as operating under the 'helm' of the ship of state, responsible for the government of the realm. The thesis establishes that the operation of the 'rule of the recognised helm' is dependent upon a uniquely conditioned political history characterised by eight crucial historically preceded 'historical constitutional forms' defining UK parliamentary sovereignty, from the thirteenth century through to the contemporary Parliament of today. The main contention is that under EU membership, successive governments, through Parliaments, have adopted practices which while not abandoning the fundamental rule, are at odds with those past constitutional precedents.

Research questions

The research questions which arise are as follows:

- How can the research literature understand the impact of EU membership on the UK's doctrine of parliamentary sovereignty?

- Can the concepts of the ‘rule of recognition’, understood in the UK context as ‘What the Crown in Parliament enacts is law’, and the adaptation of legal theory as a ‘rule of the recognised helm’, help to answer the EU-UK sovereignty impact question?
- How can political science best understand the conflict or impact of EU membership on the UK’s doctrine of parliamentary sovereignty in accordance with the UK’s historically preceded constitutional forms of that sovereignty?

Setting boundaries

It is possible that those research questions could become confused or left unanswered if the issue of the EU is not first addressed. This study concentrates on how parliamentary sovereignty has been impacted upon by EU membership and not its relationship to other features of constitutional change, such as devolved bodies (particularly Scotland) within the UK and or the relevance of human rights legislation (particularly, the Human Rights Act 1998).

That relationship between parliamentary sovereignty and the EU is an entirely unique and very direct legal and political arrangement. It has no true resemblance to the nature of the conflict between the sovereignty of Parliament vis-a-vis the devolved assemblies or human rights legislation as decided through the modern role of the courts – which is why the latter two case studies are not the subject of this thesis. The debate over devolved assembly powers is not strictly a legal conflict in the first stage as much as a politically-led one which might be better understood as concerns over the trust between electors and their chosen/acknowledged Parliament. Devolution is often theorised as seemingly presenting a major practical challenge to parliamentary sovereignty (Blick, 2012, p. 37; Bogdanor, 2009a, p. 112). At the same time, the British devolutionary settlement is in many ways continuous with previous arrangements in that administrative autonomy for the subnations has already been part of the Westminster system (Gifford, 2010, p. 327). Westminster retains ultimate supremacy (specifically, section 28(7) of the Scotland Act 1998), yet as an issue of political obligation will only legislate on devolved issues with the approval of the Scottish Parliament (Bradley, 2011, p. 60; Tomkins, 2003). Even following the Scottish independence referendum of September 2014 – in which political independence was ultimately rejected – Bradley (2011) has been entirely accurate

in demonstrating that under devolved arrangements, the claim to a political reality is more important than legal power – particularly if support for the Scottish Parliament as its main representative body develops to such a point, with political opinion and national sentiment putting it beyond the recognition of a mere ‘subordinate legislature’. The central governing problem lies not necessarily in the law itself but in a form of political agreement to not legislate for Scotland in a domestic system devised by Westminster – unlike the European governing arrangements conceptualised by a voluntary, legal and political framework for collective action in which the UK is conjoined. The UK sovereignty-EU relationship cannot be understood in those terms and this thesis will not focus on devolution.

As for the doctrine of parliamentary sovereignty in relation to the Human Rights Act 1998, as Anthony Bradley writes, it “...has often been seen as a massive obstacle in the way of any significant increase in the formal protection given to human rights in UK law.” (Bradley, 2011, p. 61). However, the European Court of Human Rights is not part of the EU architecture – which is the key reason why it is not the subject of this thesis. There is some relevance however of the European Court of Human Rights because as well as strengthening the ability of courts to protect human rights, it empowered the courts to pursue judicial review with the power to strike down invalid legislation. In this thesis, there will be, through example, an examination of the European Court of Justice and the Charter of Fundamental Rights which will, in part, overlap with the power of the European Court of Human Rights and the European Convention on Human Rights. However, the 1998 Act only allowed that subordinate legislation not compatible with Convention rights could be quashed or disapplied. So primary legislation such as Acts of Parliament which were not compatible with Convention rights remained in force but the High Court would issue a ‘declaration of incompatibility’ where ministers would be expected to remedy or make amendments to remedy the Act in order to remove the incompatibility. Courts and tribunals had to act in accordance with Convention rights and must take into account Strasbourg Court decisions. Ministers in Parliament in charge of a government Bill must issue a statement of the Bill’s compatibility with the European Convention on Human Rights (Bradley, 2011, p. 64). So whereas the courts cannot strike down the Acts of Parliament in that context, EU legislation has direct legal supremacy and European institutions can politically act in accordance with that legal power. This thesis is inherently focused on the politics of sovereignty (or absence of it) and the feature of the European institutions as political actors relative to parliamentary sovereignty, which is both legally and politically direct. There is no need to refer to a ‘declaration of incompatibility’, nor judicial review, in this thesis because parliamentary sovereignty is considered in the context of the political

power exercised by EU institutions, with their respective powers, and the role of the European Court of Justice (ECJ) since it provides the EU with the most ultimate and direct supremacy of EU law, direct effect in the courts, an official Charter of Fundamental Rights and with overarching jurisdictional power.

The challenge of EU membership sets itself apart from other constitutional challenges. It entails government ministers delegating more powers to EU institutions with which it engages through the Council of Ministers and European Council. It entails an elevation of national judicial architecture in its relationship with the Luxembourg court system. It entails perhaps most importantly a decline in the ability of national parliaments to scrutinize the executive branch of their national governments effectively. EU membership impacts upon Parliament's sovereignty because the European Parliament's effective powers understood in the context of the post-Lisbon Treaty provisions has meant that national parliaments now operate within a new 'tricameral' model in which national parliaments constitute a lower order, third chamber in a reconfigured representative system for the EU (Cooper, 2015; Cooper, 2013; Miller, 2012).

However, that does not apply to the UK, for almost without exception, "national parliaments are unequivocally considered the 'losers' in European integration because of their severe loss of competencies" (Sprungk, 2013, p. 298, contra Rizzuto, 2003). This thesis is only concerned, therefore, with the impact of EU membership – including the political supremacy of EU institutions, with the direct supremacy of EU law, direct effect in the courts, and with overarching jurisdictional power – relative to UK parliamentary sovereignty.

Thesis overview

The following chapter (Chapter 2) reviews the definition of parliamentary sovereignty which can be better framed by reassessing the original definitions of 'sovereignty' as a ranking of principles, in which the fundamental/ultimate rule located at the helm trumps all others on a continuing basis. The description of sovereignty as an ultimate rule which permits the *steering, direction* or *control* of the powers of the Crown to govern the realm is helpful. It sets out the power of law-making and ensuring the execution of the laws it has made, within the territory of the Government of the United Kingdom. However, that

provides a contemporary understanding with only a basic guidance for a definition, because classical descriptions of sovereignty intrinsically suppose both that:

- (i) sovereignty is intrinsically *historical* and that;
- (ii) sovereignty must mean not only law-making but a form of ‘governing at the helm’ of the ship of state, in which politics and law are historically co-dependent.

However, legal and political theory inherits, in the contemporary mainstream, a neo-Diceyan tradition which divorces Parliament’s sovereignty from its historical precedents and customs and divorces the highest law-making authority from the highest political authority. In other words, the ultimate rule recognising that a sovereign entity exists is divorced from the very political ‘helm’ of the state in which it is said to be located.

Yet, Herbert Hart’s legal theory came very close to addressing those concerns by asserting that ‘What the Queen in Parliament enacts is law’ is a social ‘rule of recognition’ in the UK legal system because it states the conditions any rule must satisfy in order for that rule to impose obligations as valid law and settlement (Hart, 1997). By modifying the rule of recognition to embrace a form of sovereignty, it is possible to recognise the relevance of medieval sovereignty at the ‘helm’ of the medieval state, which meant that the law and the law-making sovereign were “mutually conditioned”, contingent, reciprocal and interdependent at the helm, even though the sovereign retained the power to govern the realm (Kantorowicz, 1957, pp. 153, 155). By embracing an alternative political constitutionalist model, the rule of the recognised helm, it becomes necessary to compare and refute other leading legal and political theories which place popular (Bogdanor, 2016; Bogdanor, 2012; Bogdanor, 2009a) and legal (e.g. Allan, 2013; Allan, 2011) limitations upon legislative supremacy.

Those theories open the way both for inaccurate notions that the voluntary European Communities Act 1972 substantively and legally limited Parliament, not to mention the neo-Diceyan weakness of simply equating parliamentary sovereignty with legal supremacy. Political constitutionalism, in this sense, offers an alternative explanation of Parliament’s sovereignty in the UK constitution because ‘the rule of the recognised helm’ is both a fundamental rule of government and it is a helm which defines political actors, their uncodified relations and conventions between the executive, the legislature, the judiciary and the electorate in their tacit consent/recognition of a rule providing for sovereignty.

Chapter 3 follows up on the claim that a ‘rule of the recognised helm’ is essential to understanding parliamentary sovereignty, as both a legal and political concept, by explaining how that essential sovereignty deferred to Parliament has been made historically operable at different stages. If there is to be a Hartian ultimate rule which provide the conditions another rule must satisfy in order for that rule to impose obligations as valid law (Hart, 1997) and political settlement, it must be necessary to provide the historically precedented conditions of the social rule. The second chapter is devoted to the innovative development and explanation of eight historical constitutional forms for that purpose:

- (i) ‘What the Crown-*with*-magnates enacts is law’ (1200-1350)
- (ii) ‘What the Crown-*with*-Commons enacts is law’ (1350-1532)
- (iii) ‘What the Crown-*through*-Parliament enacts is law’ (1533-1602)
- (iv) ‘What the Crown-*with*-disputed Parliament enacts is law’ (1603-1687)
- (v) ‘What the Crown-*in*-regulating Parliament enacts is law’ (1688-1689)
- (vi) ‘What the Crown-*in*-mixed constitutional Parliament enacts is law’ (1690-1790s)
- (vii) ‘What the Crown-*in*-Parliamentary Cabinet enacts is law’ (1800-1972)
- (viii) ‘What the Crown-*through*-Parliamentary political elite with external bodies enacts is law’ (1973-present)

Each historical constitutional form illustrates a different meaning attributed to the rule of the recognised helm, from its first form to its eighth contemporary form, in an episodic, partly-discontinuous approach. In terms of sovereignty understood as the modern Crown in Parliament, law and the electorate, the concept of parliamentary sovereignty has been left with an entrenched quandary in the eighth historical constitutional form: an executive-led Parliament delegates its law making capacity to other bodies / institutions who then impose external control, steerage and direction upon that law, so that those representatives who are elected to the House of Commons by the political community to make law no longer have that practical capacity, since its everyday capacity or competency, but not ultimate right, was voluntarily ceded under the European Communities Act 1972. An elective, delegated Parliament is in a political sense a contradiction. Parliament retains its ultimate sovereignty because it has the power to terminate or change that membership by repealing or amending the European Communities Act 1972 (Tomkins, 2010), or, for example, opting out of the single currency, and yet the 44-year everyday practice of choosing not to terminate or change substantial aspects of its Parliament-diminishing EU membership has been

imagined to leave that doctrine intact. Parliament is sovereign not because it is a principle to be weighed against others via judicial interpretation but because it is a historically institutionalised rule of the recognised helm which is dependent upon the customs, conventions and politics of past historical precedents.

The incorporation of the EU into the recognised helm does not mean that the UK cannot voluntarily opt-out of other policies central to the EU. The Maastricht Treaty had incorporated a commitment to proceeding to European Economic and Monetary Union (EMU) by 1999 at the latest – but for the UK’s purposes, John Major negotiated an opt-out on this policy. Gamble (2012, p. 473) describes the Maastricht Treaty as part of “the new impulse to integration” during the 1980s, committing the European member states to ever-closer “European Union” and to the introduction of a single currency. The UK did not accede to the single currency and its opt-out clause was one of the conditions given which had to be met if the British government were to give its approval to the Treaty as a whole. The opt-out was at least, in part, designed to assure that the UK’s domestic incorporation of the Treaty respected the UK’s parliamentary sovereignty (Adler-Nissen, 2011, p. 1094). The UK therefore follows an independent monetary policy. It uses the pound sterling, not the euro currency. It maintains a floating exchange rate regime against the euro. The Conservative Government under Major defended the opt-out primarily on an economic basis – rather than an issue of constitutional or political principle – that if the UK were to “move to a single currency and it was to be successful, you would need proper convergence of the economies across Europe” (Major, 1994). Those convergence criteria could not be met at that time. Similarly, the subsequent New Labour government in 2003 assessed whether the euro was in the UK’s economic interests by setting out ‘five economic tests’ concerning the convergence between the economies of the Eurozone – which, again, were not met and again, confirmed the original opt-out decision. The UK’s broader political debate over the Maastricht Treaty was an exemplary case in the history of the EU Treaties on the basis that the UK Parliament disputed the Crown-in-Parliament’s own powers relative to the competences set out within the European Treaties. In Britain, this was met by widespread public opposition and parliamentary rebellion when the governing Conservative party was “torn apart by the civil war” over the Maastricht Treaty (Gamble, 2012). In the course of events, the UK’s ‘awkwardness’ had been accommodated through ‘variable geometry’ (Geddes, 2013, p. 62), affirming that the UK proceeds with a form of ‘flexible engagement’ (Geddes, 2013, p. 255). In this instance, the UK’s Major government secured two opt-outs on the Maastricht treaty: (i) deferring a decision on participating on the final stage of European Economic and Monetary Union (EMU), and;

(ii) the Social Chapter (Gowland et al., 2010, p. 103). They are often described as John Major's "negotiating triumphs" (Gamble, 2012). The political controversy and the events surrounding the UK's opting out of the single currency are relevant because MPs in Parliament disputed its own sovereignty on the basis of the principles of competences which it was being asked by its incumbent Government to transfer to the European institutions. The opting out of the single currency illustrates that Parliament has a hand at the recognised helm, albeit it is not the only hand. The 44-year practice of incorporating the EU into the recognised helm does mean the UK can voluntarily and politically opt-out of other policies central to the EU, including the ability to opt out of the single currency.

Chapter 4 argues that Parliament has become practically less sovereign because, since 1973, the UK's governing helm has had the EU institutions incorporated into it – this has led to a fusion of the executive with EU machinery, the dilution of the domestic legislature and the fusion of the judiciary with the Luxembourg court system, which impacts upon and unsettles the political strength of parliamentary sovereignty. That explanation of parliamentary sovereignty impacts upon the sixth of the eight historical constitutional forms, reflected in the views of Sir William Blackstone (1765), Edmund Burke (1774) and Montesquieu (1748) in the eighteenth century, in which the status of the ultimate rule in the sixth historical constitutional form of 'What the Crown-*in-mixed* constitutional Parliament enacts is law' required balance against its political custom of the mixed constitution to support the rule. The mixed constitution has generally been employed in relation to the British constitution, when it is said that the monarchic, aristocratic Lords and democratic Commons powers were able to check one another (Kors, 2012; Jenkins, 2011; Gagarin, 2010; Lieberman, 2006; Bellamy, 1996, p. 441; Blythe, 1992, p. 12), while retaining the benefits of each in a balanced constitution (Blackstone, 1765, pp. 50-2; Lieberman, 2006, p. 318). The contemporary, changing relationships between the executive, the legislature, the judiciary and the electorate have altered remarkably because of the interaction with the EU (Jack et al., 2011, p. viii). By recognising the contemporary relationship between parliamentary sovereignty and the tripartite mixed constitutional model in contemporary constitutional arrangements, contrasts can be made with Vernon Bogdanor's (2009a) constitutional state theory, or Martin Loughlin's (2010) theory in which a tripartite structure has given way to complex arrangements of other executive bodies. By drawing on those contrasts, it is proposed that the case study of the EU-level Financial Transaction Tax (FTT) is a demonstration that the EU institutions incorporated into the UK's recognised helm has, through this unsettling of the historical precedented mixed constitution model, impacted upon and unsettled

parliamentary sovereignty. After all, on the very issue of taxation itself, the 1689 Bill of Rights establishes for the House of Commons a sole right to authorise taxation and the level of financial supply to the Crown.

Chapter 5 develops the argument that Parliament has become practically less sovereign because the UK's helm of state has had European Parliament-level parliamentary representation competing over it, not for individual interests, but over its capacity to collectively represent its electors. In the sixth constitutional form, the ultimate rule required balance against its political conditions, including collective representation, to support the rule. That the UK Parliament has become less sovereign due to the distorting of its capacity to collectively represent is consistent with the European Parliament exemplifying a high level of specialist 'functional' representation, a shared neo-corporatist emphasis with the central EU institutions, its reliance on 'constitutionalisation' as a means to strengthen its representative linkages and a role of party and management of political partisanship. The case study of the Working Time Directive lays bare that the UK governing helm of state has had European Parliament-level parliamentary representation competing in its capacity to collectively represent its electors. That competition produces an unsettling of Westminster's historically precedented capacity to collectively represent its electors as strongly embedded within previous historical constitutional forms, thereby diluting the strength of parliamentary sovereignty.

Chapter 6 goes on to argue that Parliament is effectively less sovereign because the recognised helm has had EU-level fundamental rights schemes incorporated into it. The historical precedents of Bracton (in the first historical constitutional form) present a constitution in which governing at the helm is presented as legally distinct but politically contingent upon its capacity to determine and respect fundamental rights. Under EU membership, EU fundamental rights schemes protected by the courts become constitutionally elevated, entrenched in codes of written and legal form. As such, rights are expressed as unchallengeable instruments above politics – complete with EU legal supremacy, direct effect and ECJ jurisdiction – relative to the historically precedented and minimalist protection afforded by Parliament. The submission of the domestic legislature to the courts, along with a final binding effect upon the executive, impacts upon and dilutes the strength of parliamentary sovereignty. This chapter appeals to the political constitutionalist tradition, addressing the primacy of political legitimacy and democratic parliamentary majorities over constitutional entrenchment and the contemporary narrow determination of rights by courts. Notably, the case study of the EU free movement right

makes evident that the recognised helm has had EU rights incorporated into its constitution, leading to the elevation of the judiciary as a rights-adjudicating court system as it fuses ever-closer into the Luxembourg court system. This has meant the dilution of the domestic legislature as a rights-providing institution. The deep political claims made to the constitutional and institutional entrenchment of the rights themselves, irrespective of political legitimacy, combined with the disappearing consensus between the arms of state and community in protecting rights has progressed this continued legislative decline and judicial advance in the UK, impacting upon the resettling of parliamentary sovereignty.

Chapter 7 holds that Parliament becomes practically less sovereign when the UK's helm of state has had EU-level decision-making incorporated into it. It directly reduces parliamentary ultimate decision-making power over political decisions as exercised by the Government-in-Parliament on behalf of its electors. Where the UK Parliament has become less sovereign due to the incremental removal of parliamentary power over policy and law, it provides an executive-legislature gap. David Cameron's Prime Ministerial-led renegotiation ahead of the EU Referendum provided significant evidence of the executive-legislative gap under EU membership. Since the EU Referendum of June 2016, Parliament's ultimate power to decide on the UK's EU relationship permits the executive to pursue a constitutional resettlement, if it so chooses, addressing the historical dilution of parliamentary powers. In so doing, as the UK seeks to un-incorporate EU-level decision-making by pursuing a policy of leaving the EU, the barebones of parliament's potential regaining of its ultimate decision-making power which reaffirm Parliament as sovereign are evident (contra Mabbett, 2017). Such a step signifies the realignment of Parliament with a historically precedented basis in which the operation of Parliament's ultimate decision-making power over political decisions was maintained by the Government-in-Parliament on behalf of its electors. The historical constitutional forms, as precedents, present a British constitution in which governing at the helm is presented as dependent upon both historical constitutional form six and eight accumulatively acting as guides for ultimate decisions on vital issues being taken by consent in the deliberative assembly in the recognised helm. They are both dependent upon Dicey's principle of government by consent. This has been interwoven into the contemporary powers of Parliament to outsource that decision-making capacity over political decisions. By considering the UK's holding of referendum on the EU, several developments suggest a major, if not enhanced role for politics in determining the character of Parliament's sovereignty. This suggests the holding of the 2016 referendum on the UK's membership of the EU has enhanced, not

eroded, the principle of representative government (McKibbin, 2017, p. 385) and Parliamentary sovereignty.

So, the next chapter turns to a review of the definition of UK parliamentary sovereignty which can be better framed by reassessing the original definitions of ‘sovereignty’ as a ranking of the most fundamental/ultimate rule located at the helm trumping all others on a continuing basis. It is a notion of sovereignty in Parliament which permits the *steering, direction* or *control* of the powers of the Crown to govern the realm; and intrinsically supposes both that sovereignty is *historical* and that it enables both law-making and ‘governing at the helm’ of the ship of state, in which politics and law are historically co-dependent. It seeks to consider UK parliamentary sovereignty as both a fundamental rule of government and a broader helm which defines political actors and their uncoded relations to enable the consent and recognition of that rule providing for sovereignty.

Chapter 2: the meaning(s) of sovereignty, parliamentary sovereignty and the ‘rule of recognised helm’

The central argument of this chapter begins by reviewing the definition of parliamentary sovereignty and examining the locating of the ultimate rule permitting the *steering*, *direction* or *control* of the powers of the Crown to govern the realm. It is intrinsically *historical* and means not only law-making but a form of ‘governing at the helm’ of the ship of state, in which politics and law are historically co-dependent. Parliament’s sovereignty in the UK constitution is approached as ‘the rule of the recognised helm’. It is both a fundamental rule of government and as a helm which defines political actors, their uncodified relations and conventions between the executive, the legislature, the judiciary and the electorate in their tacit consent/recognition of a rule providing for sovereignty.

It is first considered that the definition and explanation of parliamentary sovereignty can be better understood by turning to classical and original definitions in which sovereignty implies:

- *supremacy* as a ranking of principles or rules;
- *government at the helm* as a steering, direction and control over the governance of the realm;
- *imperium*, as the commanding power of government to legislate and execute laws;
- its continuation/*succession* and;
- its *territory, or dominium*.

The sovereignty of Parliament is, in that brief sense, a ranking of principles, in which the fundamental/ultimate rule located at the helm trumps all others on a continuing basis to permit the steering, direction or control of the powers of the Crown to govern the realm by the power of law-making and ensuring the execution of the laws it has made, within the territory of the Government of the United Kingdom. However, that provides a contemporary understanding with only a basic guidance for a definition, because those five features suppose that (i) sovereignty is intrinsically historical and that; (ii) sovereignty must mean not only law-making but a form of ‘governing at the helm’ of the ship of state, in which politics and law are historically co-dependent. Government (or, *gubernaculum*) at the Crown’s helm of the ship of state, is the ability to steer, direct and control that which is necessary for the governance of the realm. The classical concept of *gubernātiō* is

“steering; direction, control” but most importantly, *gubernaculum* is seen as the “helm of the ‘ship of state’ (Morwood, 2005), expressed as raw political sovereignty ‘at the helm’.

Yet, legal and political theory inherits in the contemporary mainstream, a neo-Diceyan tradition. That tradition has, on the one hand, dealt so precisely with the axiom of legal supremacy – to make or unmake any law – as understood by the common lawyer and the courts. It has, on the other hand, enabled the national Parliament, judges, and courts to inhabit a sphere of quasi-silence on the primacy of its political institutions, including parliamentary primacy itself, and deeper arrangements defined in the national constitutional character (e.g. Russell, 1987, p. 545). It divorces Parliament’s sovereignty from its historical precedents and customs and divorces the highest law-making authority from the highest political authority. In other words, the ultimate rule recognising that a sovereign entity exists is divorced from the very political ‘helm’ of the state in which it is said to be located.

What is absent in Dicey and what is required in a theory of Parliament’s sovereignty is the assumption of an ultimate rule *directing* and *steering* government, through Parliament, and which can be recognised by others as providing the capacity to enable government. Hart came close to that understanding by asserting that ‘What the Queen in Parliament enacts is law’ is a ‘rule of recognition’ in the UK legal system because it states the conditions any rule must satisfy in order for that rule to impose obligations as valid law (Hart, 1997). Yet, even where Hart argues for a rule of recognition, it becomes almost purely a legal rule for validating law even though it is referred to as social (Perry, 2015, p. 284), thereby eliminating the role of the helm of state in making Parliament sovereign.

Hart’s rule of recognition requires some political modification. Such an amendment must seek to embrace a form of sovereignty which is both intrinsically historical and in which politics and law are interdependent at the helm, even though the sovereign retained the power to govern at the helm of the ship of state. This is to refute other leading legal and political theories, not merely the neo-Diceyan inheritance of the English lawyers. Constitutional state theory, under Vernon Bogdanor’s (2009a) approach, for example abandons rule-recognition in favour of a rearranged, modern, popular constitutional state. From Bogdanor’s ‘popular sovereignty’ perspective, the modern theory of a popular constitutional state directly seeks to affirm the primacy of electors as delegating their representatives in the representation process at the expense of the doctrine of parliamentary sovereignty, when the electorate should be considered as steering and directing that

sovereignty. The direct ‘popular sovereignty’ representation attempts to misconstrue what it perceives as the old, faded, doctrine of parliamentary sovereignty.

The need for a ‘political’ theory also develops out of the refutation of radical common law constitutionalism for favouring the sovereignty of the law of the courts over the law of the democratic, sovereign decision-making of Parliament. The common law tradition holds parliamentary sovereignty is founded on a common law foundation – and this has a strong relationship with the proposition that parliamentary sovereignty has been limited by EU law (Allan, 2013). It turns on the incorrect assumption that the power of the law of the courts explicitly makes Parliament sovereign. There is a recognition of certain limits as substantive limitations upon legislative supremacy, which opens the way both for inaccurate notions that the voluntary European Communities Act substantively and legally limited Parliament, not to mention the neo-Diceyan weakness of simply equating parliamentary sovereignty with legal supremacy.

The school of common law radicalism has nevertheless continued to pursue its questionable abandonment of rule of recognition based on the earlier theories of the moral constitutionalist tradition of Dworkin (1977) and neo-Dworkinian theory for asserting that Hart’s ultimate rule should be assigned a metaphorical weight relative to other principles, on the basis of widening the scope of judicial interpretation, and can therefore ultimately be rejected. Against that background, it might be considered that parliamentary sovereignty’s form, and the restriction and extension of powers which enable that form, demonstrate that it is not an exercise in legal logic or the recognition of fundamental principles of morality, according to moral theory, as those factors may mediate the sovereignty claim, but the claim itself is rooted in political condition (Loughlin, 2010, pp. 236-7).

Political constitutionalism can offer an alternative explanation of Parliament’s sovereignty in the UK constitution. In the constitution, ‘the rule of the recognised helm’ becomes necessary because it is both a fundamental rule of government and it is a helm which defines political actors, their uncoded relations and conventions between the executive, the legislature, the judiciary and the electorate in their tacit consent/recognition of a rule providing for sovereignty. Why should it otherwise be necessary to equate the recognition of the rule of Parliament’s sovereignty with **only** the law of Parliament i.e. statute (Dicey, 1964) or increasingly the recognition of statute by the common law of the courts (Allan, 2011, 2013) or increasingly by the people (Bogdanor, 2009a)? The central place of representative, parliamentary government which affirms the ultimate rule

adequately expresses the supreme role of the legislature, as elected and *steered* by the people, but also a subsidiary role of the judiciary, and their elected government, in providing recognition to the rule. Understanding parliamentary sovereignty in terms of a political constitutional model of the state enables it to be viewed through an explanatory framework within which to make sense of our constitutional self-understandings (Gee and Webber, 2010), be it political or legal. If government is by definition the agency authorised by law to issue laws, the rule of law can barely constrain the rule of persons (Bellamy, 2007). Such a model reaffirms the essential and elective nature of political institutions, including Parliament, acting through very ordinary political and legislative processes to determine its sovereignty.

The five principles of the meaning of sovereignty

The meaning of sovereignty itself is important to unbundle before one can begin with the meaning of parliamentary sovereignty. If sovereignty could be generally conceived of as the continued supremacy to rule over a given territory, there are identifiable features of that sovereignty formula that have occupied a primacy within that concept. The five following concepts are fundamental to my unbundling of the concept of sovereignty. The narratives of sovereignty are found within a rich interweaving of its medieval and modern forms, usually to provide political stability and anchorage.

Firstly, *supremacy* is central because what legal and political theorists such as Hart have attempted to identify is the ultimate rule, where assessing the ‘rule of recognition’ will provide the criteria by which the validity of all other rules are judged. That ultimate rule provides a rule of recognition providing the criteria by which the validity of other rules in the legal system is assessed (Hart, 1997, pp. 102-3). Supremacy, in a general sense, has simply meant “the state or condition of being superior to all others in authority, power, or status: the supremacy of the king” (*Oxford English Dictionary*, 2017). Theories of sovereign authority have long rested upon the claims of supreme and absolute authority in the polity (Bartelson, 2011).

Secondly, specific priority in understanding sovereignty is also given to the meaning of government at the recognised helm. With reference to Henry de Bracton’s medieval constitutionalism, he essentially divided the total act of the Crown’s government as *gubernaculum* from the claims of fundamental law, *jurisdictio* (McIlwain, 1947, p. 86).

That is, Government is separated from law. As Vile argues, the limitations placed upon the Crown by subjecting him to a fundamental law which he did not himself make provided the basis for a legislative power which was independent of the will of the King. That went hand in hand with the idea of an executive power in the King, to ensure that the law was put into effect (Vile, 1967: 23). While the distinction made by McIlwain has often been thought of as less than convincing (Corwin, 1941, p. 535), it is the *gubernaculum* that is primary feature. It is the Crown's helm of the ship of state, which steers, directs and controls that which is necessary for the governance of the realm. It is often overlooked that the proper classical concept of *gubernātiō* is "steering; direction, control" and most importantly, *gubernaculum* is seen as the "helm of the 'ship of state' (Morwood, 2005) – it is raw political sovereignty. That 'taking of the helm' is often recognised as government being exercised by a given political actor or set of actors, be it the Crown, officials or governments, and irrespective of Hart's narrow contemporary emphasis on law (as opposed to habit, obedience, coercion, etc), focused on how they are seeking to maintain that position. Sovereignty becomes a necessary feature of politics, in principle and as exercised.

Thirdly, one of the classical and Roman forms of sovereignty (*Imperium*) has been that the power of government to legislate and execute laws (Fellmeth and Horwitz, 2009) and ultimately, the "Latin word for a command, which grew to signify the right to give orders, and so to mean supreme power..." (Morwood, 2005). *Imperium* of the Roman Empire is characterised as the unlimited discretionary authority to issue commands carrying the binding, statutory force of law (Lee, 2016, p. 18). For Hobbes, *imperium* itself is rule (Hoekstra, 2013, p. 1095-6). When observing the capacity to make law in the transformation of the sovereign structure in England, then the UK, in the past seven hundred years, constitutional theorists are attempting to indicate the structure of office and institutions of the sovereign, for example, from:

- the Crown;
- the Crown-consulting-Parliament;
- the Crown-ruling-with-Parliament;
- the Crown-ruling-through-Parliament;
- the Parliament-rules-with-the-Crown;
- the Crown-in-Parliament;
- the Parliament-rules-through-Parliament;
- Parliament-rules-through-Parliament and external agency/body.

It only tells us about the nature of office. But detailed analyses of sovereignty require more than that. How have they maintained their sovereignty, as exercised – as edict, norms, moral guidance or laws? Modern sovereignty came to rest not on law generally or the legal order itself (as Allan, 2010, p. 27, maintains) but legal sovereignty established through Parliament and its enactments. It is possible to concede – with Bodin (1576) and Hobbes (1651) – that in that modern form, law is the major requirement. The notion of sovereignty invariably depends upon supreme authority combined with a supreme law and a supreme law-making capacity (i.e. a parliament). Lords Scarman and Hailsham’s questioning over the modern executive-in-Parliament’s total control over law (Scarman, 1992; Hailsham, 1976) are even approached as the problematic “*imperium* of Executive Government” (Kirby, 2006, p. 466). So strong is the claim to law-making as the basis of sovereignty that legal theorists (for example, Law and Martin, 2009) tend to define sovereignty merely in terms of that which has ultimate authority to impose law on everyone else in the state and to alter any pre-existing law.

Fourthly, the role of sovereignty as continuation, or succession of political authority, is of relevance since in contemporary legal and political theory, Hart’s 1961 legal exposition of sovereignty, *The Concept of Law*, provides a necessary explanation of legal sovereignty on the assumption that it must be characteristic of a legal system to possess a continuity of law-making power by a set of rules bridging the succession from one law-giver to another law-giver in advance (Hart, 1997, p. 53). Where a new Parliament begins to legislate, it is clear that there is a definite and established rule providing him or her – as a (new) line of persons – the right to do this when it is their turn. It is often recognised that a fundamental aspect of the rule of sovereignty, including for Dicey (1964) and Hart (1997), is that ‘no Parliament can bind its successors’. The Crown-in-Parliament is preserved throughout changes of successive legislators – by it resting on generally accepted fundamental rules. That general acceptance is dispersed between officials and ordinary citizens. In doing so, they collectively affirm the continuation of sovereign power.

Fifthly, sovereignty is also defined with strong reference to territorial boundaries (Bartelson, 2011; Holland, 2010; Ruggie, 1993). One of the foundational claims to sovereignty is that of the concept of territory, or *dominium*, meaning the state’s claim to all the territory where it is located (Grant and Barker, 2009). *Dominium* has been defined as “the power of a state to exercise supreme authority (absolute sovereignty) over all persons and things within its territory” (Law, 2017). The state possesses the only legitimate voice, diplomatic influence and arms for the community within its territory to assert its

sovereignty. Nothing else can. A convincing analysis presented by Spruyt (1996) asserts that sovereignty changed the structure of the international system when political authority was based on territorial exclusivity. The key elements of the modern state, internal hierarchy and external autonomy, in the Late Middle Ages, were responsible for this development. It is therefore defined by territory which for Spruyt is bound up with centralised decision-making authority.

It is a thorny problem to explicate a complete and parsimonious theory of sovereignty in the abstract when assessing parliamentary sovereignty but it might aid the explanation of parliamentary sovereignty to accept in general terms the criterion set out in Box 2.1.

Box 2.1: Sovereignty

- | | |
|-------|---|
| (i) | implies <i>supremacy as a ranking of principle</i> ; |
| (ii) | confers <i>gubernaculum as steering, direction and control over the governance of the realm</i> ; |
| (iii) | consists of <i>imperium, the commanding power of government to legislate and execute laws</i> ; |
| (iv) | relates to <i>its continuation/ successors</i> ; |
| (v) | its <i>territory, or dominium</i> . |

The sovereignty of Parliament is, in this sense, a ranking of principles and, in which the fundamental/ultimate rule located at the helm trumps all others on a continuing basis to permit the steering, direction or control of the powers of the Crown to govern the realm by the power of law-making and ensuring the execution of the laws it has made, within the territory of the Government of the UK.

The working definition is conditional and dependent upon the five features of sovereignty discussed above. The features themselves reflect the assumption that one form of sovereignty should not be viewed as operating linearly from antiquity to medieval and modern forms. The features explain both that:

- Sovereignty is intrinsically historical. Sovereignty is predicated on a competition between rules in which a more supreme ultimate rule (or set of rules) permits

government and which can be recognised by others, including its competitors, as providing that capacity to enable government.

- Sovereignty requires a form of ‘governing at the helm’ of the ship of state to steer, direct and control the realm. Sovereignty requires a power of government to legislate and execute the laws, an authority buttressed by a supreme law in which politics and law are frequently co-dependent. It is also identified that the succession of law-making power and definition of territorial boundaries are instrumental political features in defining sovereignty and understanding its parameters. More concisely, the definition of sovereignty prioritises both the provision of a fundamental rule of recognition, in addition to government at the helm, in which law and politics are historically co-dependent.

The meaning of Parliamentary sovereignty: the right to make or unmake any law

It is to Dicey’s credit and his long-serving definition that it dealt so precisely with the axiom of legal supremacy as understood by the common lawyer and the courts. Yet, by dismantling the power of command behind law-making as well as government of the realm, as the political, institutional arrangement at the ‘helm of state’, Dicey (1964) effectively discarded the political sovereignty which left him only with barebones theory of legal supremacy, not parliamentary sovereignty. On a legal basis, the doctrine of parliamentary sovereignty, as defined by the seminal work on this concept, A. V. Dicey (1835-1922) referred to that sovereignty as defined by

- A positive limb, expressed as the “... right to make or unmake any law whatever” and;
- A negative limb, expressed as “that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.” (Dicey, 1964, pp. 39-40).

Dicey (1964) confusingly refers to the doctrine as both the “dominant characteristic of our political institutions” and yet it is only “a legal fact, fully recognised by the law of England” (Dicey, 1964, p. 39). He accepts it affirms the unlimited legislative authority of Parliament, although by practicality and common sense, he accepts it does not e.g. there are some tyrannical laws which could not pass (Dicey, 1964, p. 41). For Dicey, the supremacy over any competing legislative power in his definition applies only to the

Crown, each House of Parliament, the constituencies and the law courts in the English constitution – certainly, not the European Communities or Union, which did not exist in Dicey's age.

For Dicey, all judicial legislation is subordinate and cannot be considered to be inconsistent with the supremacy of Parliament primarily because judges, following precedents, do not claim to exercise any power to repeal a statute whilst Acts of Parliament on the other hand may override the law of judges (Dicey, 1964, p. 60). Moral law cannot limit it because morality cannot invalidate an Act of Parliament before a court. For Dicey, even Royal prerogative powers can be regulated or abolished by Acts of Parliament (Dicey, 1964, p. 64). One central feature of parliamentary sovereignty for him is that one Parliament, by its enacted laws, cannot bind its successors. Dicey accepts the sovereign power is invested in Parliament but is critical and dismissive of sovereignty's political dimension, as opposed to its strict legal sense (Dicey, 1964, p. 73). Even though Dicey is considerate of representative government, and that the will of the electors will always in the end "assert itself as the predominant influence in the country", he considers this only as a "political, not legal fact" (Dicey, 1964, p. 73). The courts take no notice of the will of the electors in making judicial decisions (Dicey, 1964, p. 73-4). It is notable, however, that Dicey assigns a sort of convenient, symbiotic, equivalence between the sovereignty of Parliament and the "the rule or supremacy of law" securing the rights of the individual (Dicey, 1964, p. 184, Chapter XIII), which can leave legal analysts in some confusion in the modern context.

Dicey's principle presents legal supremacy under the form of parliamentary sovereignty. It is not coincidental that most contemporary, neo-Diceyan legal scholarship refers to parliamentary sovereignty as legal supremacy of the Acts of Parliament. Dicey is critical of sovereignty's political dimension because despite his embracing approach toward representative government and the rule of law, it cannot consider politics as relevant to Parliament's sovereignty. That is chiefly because any constraint upon it must be recognised by the courts only, otherwise on Dicey's terms, it does not exist. The elimination of politics and conventions helps to explain the confusing parity Dicey provides for parliamentary sovereignty and the supremacy of the rule of law (Francis and Morrow, 1994; Russell, 1987). To its credit, Dicey's theory affirms an ultimate rule – the Crown in Parliament's right to make or unmake any law – in the legal system (positive limb), supreme to other bodies (negative limb) in the eyes of the law of England. It is dismissive however of Parliament's sovereignty enabling a co-dependence between law

and the politics of commanding and governing, because it is simply not concerned with government at the helm, merely the role of politics in its service to statute.

Parliament does retain the theoretical power to make or unmake any law, consistent with the positive limb of Dicey's definition, even if it runs contrary to Community law and even where there may be political difficulties in pursuing that path. However, the negative limb provides that nobody may override or set aside an Act of Parliament. The difficulty here is that although that remains true in English law, the EC case law of the Court of Justice has since the early 1960s established that wherever there is a conflict between national law and Community law, EC law would prevail. It is therefore questionable as to whether, in all circumstances, a political body in England could not set aside an Act of Parliament. Parliament can still make or unmake any law whatsoever but it is only under English law (not EC law) that nobody may override or set aside a statute (Tomkins, 2010). To reclaim the 'fullness' of its sovereignty, its ultimate sovereignty, it could choose to repeal or further amend the European Communities Act 1972. There are in fact many examples of draft parliamentary Bills and amendments in Westminster which expressly negate the effect of the EU rule, although none have yet been enacted (Tomkins, 2010). The Repeal Bill under Theresa May's post-2017 Conservative Government, if enacted, will end that supremacy of EU law in the UK by repealing the European Communities Act 1972 (May, 2017a).

The modern British constitution's rule of parliamentary sovereignty with respect to EU law – as expressed through the ongoing judgements of the courts (such as Lord Denning in *Macarthy's Ltd. v Smith* [1980], Lord Diplock in *Garland v BR Engineering* [1983], Lord Bridge in *Factortame* [1990] and Lord Justice Laws in *Thoburn* [2002]) all confirm the 'entirely voluntary' nature of the UK entering into that arrangement under the European Communities Act 1972. The courts only act in such a way only because Parliament, through its legislative authority, told them to – if Parliament under that same authority told them not to do so, then they would obey that too (Bingham, 2010, p. 164). That entirely voluntary nature describes a pooled sovereignty which can be reclaimed. The theory demonstrates the quandary of the neo-Diceyan definition – it accurately accepts on the one hand the voluntary nature of Parliament in making or changing European arrangements via Acts of Parliament, whilst also, on the other hand, enabling the dilution of the role of national institutions and politics (including Parliament) and the politics of people as part of that.

The neo-Diceyan definition has enabled the national Parliament, judges, and courts to inhabit a sphere of quasi-silence on the primacy of its political institutions, including parliamentary primacy itself, and deeper arrangements inhabiting the national constitutional character in the structure between the executive, the legislature, the judiciary and the electorate. Of considerable interest is one ECJ case confirming the supremacy of EU law in relation to principles of national fundamental rights and national constitutional character, *Internationale Handelgesellschaft v Einfuhrhund Vorratsselle fur Getreide und Futtermittel* [1970] (see also Bradley and Ewing, 2010, p. 127). While it confirmed, perhaps unsurprisingly, that “the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question”, it made a deeper political point about national constitutional character in relation to fundamental rights and EU – that “the validity of a Community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure” (*Internationale Handelgesellschaft v Einfuhrhund Vorratsselle fur Getreide und Futtermittel* [1970]). Respect for fundamental rights, in other words, is not only integral to the principles of EU law protected by the Court of Justice but precedes consideration of the constitution of a state.

Dicey knowingly divorced constitutional law from customs and conventions because the latter were not enforced by the courts (Allan, 2013; Dicey, 1964). Although Dicey accepted certain political customs, principles and rules as “the conventions of the Constitution” which regulate relationships (Russell, 1987, p. 545), he subverted them as non-legal additions to the constitution. For example, that the Prime Minister cannot remain in office without the support of a majority in the House of Commons is a constitutional convention only. The neo-Diceyan view suffers from seeking to divorce Parliament’s sovereignty from its historical precedents. It attempts to divorce the highest law-making authority from the highest political authority. The nineteenth century constitution was less focused on establishing clear links between sovereign power and individual rights (Francis and Morrow, 1994, p. 23). In other words, the consensual ultimate rule recognising that a sovereign entity exists is divorced from the very ‘helm’ of the state in which it is said to be located. Of course, law and law-giving are undeniable features but parliamentary sovereignty has no sovereign aspect if it does not first accept that its sovereign power is

lodged within its entrenched, widely recognised and organised pattern at the helm of the governing state.

The meaning of Parliamentary sovereignty: the ‘rule of recognition’

Sovereignty is predicated on a competition between rules in which a more supreme, ultimate rule permits government and which can be recognised by others as providing the capacity to enable government. Given the limitations of the neo-Diceyan view, this thesis moves towards Hart’s view which, like Dicey before him, refuted the earlier approach of John Austin that law consists of orders backed by threats. The legal system consists of social rules, according to Hart (Hart, 1997), but it is important that Hart is held to account on how those rules are genuinely social (Perry, 2015). He discards of sovereignty as explained by Hobbesian or Austinian habit of obedience because he believes that cannot explain rules themselves (see Shapiro, 2001, p. 156). Yet Hart does assert that ‘What the Crown in Parliament enacts is law’ is a ‘rule of recognition’ in the UK legal system because it states the conditions any rule must satisfy in order for that rule to impose obligations as valid law (Hart, 1997). Because of uncertainty, the static character of rules and inefficiency as basic defects in the primary rules of obligation, they are necessarily supplemented by secondary rules (Hart, 1997, p. 94). Hart’s reductionism is attributable to his distinct legal positivist approach which by its very definition, is a doctrine which holds not only that that what counts as law in any particular society is fundamentally a matter of social fact, rule or convention but that there is no necessary connection between law and morality (Leiter and Coleman, 2010). In the US, the rule is the constitution itself. Instead of using moral or political benchmarks, for assessing the validity of law, it is assessed and consensually accepted that private persons and officials are given the authoritative criteria for identifying primary rules of recognition (Hart, 1997), although some legal theorists assume the rule of recognition is upheld only by senior law-applying officials (see Shapiro, 2001 contra Postema, 2008, p. 49; Goldsworthy, 1999). The rule of recognition affirms something fundamental about the operation of Parliament’s sovereignty.

Hart argues for a rule of recognition. This becomes almost purely a legal rule for validating law even though it is referred to as social (see Perry, 2015). It thereby eliminates the role of the recognised helm directing and commanding law-making. In a complex legal system, for Hart, law requires the union of primary and secondary rules – whereas primary rules impose obligations, secondary rules provide rules through which we can introduce,

modify or end those primary rules. Within secondary rules, Hart argues for a ‘rule of recognition’ – which is the rule that states the conditions any rule must satisfy in order for that rule to impose obligations as valid law (Hart, 1997, p. 94). That rule of recognition will provide some features which by that rule are a “conclusive affirmative indication” that it is a rule of the group to be supported by the social pressure it exerts; even though in Hart’s words, little is said of the social pressure it exerts. It is explained as “Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation” (Hart, 1997, p. 100).

By avoiding Hart’s legal reductionism, it seems reasonable to defend the operation of legal rules as social rules (Perry, 2015), requiring the consensus of state officials and private persons (Sciaraffa, 2011; Galligan, 2006, p. 65; Goldsworthy, 1999; Hart, 1997). In spite of Hart acknowledging the rule of recognition as a social rule, it is then treated as anything but social or political. In this specific sense, Tucker (2011) made a similar observation but it is not obvious that this results in an indeterminacy of the rule of recognition. It is not credible that contested norms/conventions result, as Allan (2013, p. 54) proposes, in the ultimate rule being viewed as indeterminate. It is possible therefore to share Hart’s preoccupation with law as a social rule (Perry, 2015) and that a complex legal system requires a rule of recognition maintained by officials and private persons. It is possible to accept his expression of the rule of recognition while not sharing the neglect of parliamentary structure of law and state, which underpins the rule.

Legal and political theory should strive to explain the broader political and legal space and boundaries within which law is made and constrained, not merely law *per se*. While Hart’s amended version of legal positivist doctrine in terms of its normative and systematic assumptions of law does recognise law as social fact, that equally means acknowledging facts as social. The rule of recognition is an apolitical abstraction in explaining parliamentary government if it is not a rule of the recognised helm, for which we must first have some primacy accorded to the role of precedents and conventions existing within previous historical constitutional forms. The rule of recognition otherwise implies an abstract rule recognised as sovereign rather than the collective institutional framework of the state which operates within the rule.

Hart’s rule of recognition can be usefully modified politically. Such an amendment must seek to embrace a form of sovereignty which recognises and determines the ultimate rule. Hart’s original formula is one that requires recognition because in parliamentary terms it requires consent. It cannot exist as a standalone definition. Hart’s rule as ‘What the

Crown in Parliament enacts is law’ is a “rule of recognition” in the UK legal system. It states the conditions any rule must satisfy in order for that rule to impose obligations as valid law (Hart, 1997) and it confirms that ‘recognition’ is vital. On recognition, Postema (2008, p. 49) acknowledges that Hart himself recognized both that the fundamental rule of recognition must be accepted and practiced by law-applying officials, and also, that “the behaviour of most of the population governed by these norms must be in broad conformity with the system of legal norms traceable to the rule of recognition”. Postema (2008) also observes that Hart was ‘silent’ about the status of the second condition and the relationship between the two ‘recognition’ conditions, which is central to the content of this thesis. By accepting Hart’s primary rule, this thesis argues that the secondary condition or sub-rules relate to recognition of rules by others which Hart did not consider or allude to.

The silence however on legitimately expressing ‘recognition’ as consent by Parliament, public and officials explains the problem of understanding rules as social. Recognition is complex but it is meaningful to maintaining sovereignty (both internally and externally). It is broadly more constitutive of statehood and fulfils an inherently conservative function where it presupposes a world populated by distinct and bounded political communities (Bartelson, 2016, pp. 313, 319).

Fundamentally, when fully expressed, the Hartian rule of recognition does strongly help to clarify the meaning of parliamentary sovereignty. It affirms the sovereignty conferred by an ultimate rule in an order of legal rules but in the absence of the power to command or govern through which the state organises its structure between the executive, the legislature, the judiciary and the electorate. What Hart had in fact acknowledged, but did not express, is a rule of the ‘recognised helm’, which addresses the political and legal space and boundaries within which law is made and constrained. The rule of the recognised helm combines the features of two existing theories – one of them is contemporary (Hart) and the other is traceable to a medieval understanding of sovereignty (Bracton).

The legal assertion that there is ‘sovereignty in Parliament’ implies specific steps are taken by Parliament to act and to legislate, namely Hart’s rule, ‘What the Crown in Parliament enacts is law’. Although the contemporary Parliament has broad functions in politics – to provide the government and thereafter support it, to scrutinise the work of government and to enable the government to raise taxes, not merely debating and passing all laws – it nonetheless returns to, and pursues Hart’s rule, in providing for a parliamentary process. In that process, a proposal for a new law, a Bill, that is presented for

debate in Parliament can be introduced by the House of Commons or House of Lords first (except in the case of Finance Bills) and when both have agreed on its content, then the reigning Crown approves it – it receives Royal Assent and becomes an Act of Parliament (UK Parliament, 2014). Understandably, the powers of the House of Lords are, to an extent, limited by the Parliament Acts. Since the monarch in modern time retains an important symbolic role – after administration of justice was removed from 1689 onwards and subsequent depoliticization – the everyday practical implementation of the Act of Parliament is the responsibility of ministers and their relevant government departments. The ‘Crown’ powers previously exercised by the reigning monarch have meant, in the present day, that ministers of the executive now exercise the majority of those powers. The powers of the Crown are in present times exercised by the executive through and on the advice of ministers accountable to Parliament (Jack et al., 2011) – in other words, only in so far as the executive retains the confidence of the legislature. That is what makes statute *law*. With the assertion of the authority to legislate also comes the capacity to take that law away i.e. by repeal, so that Parliament at all times retains a right to legislate as well as the reflexivity to take away that legislation without losing its successive and inherent function to make law.

The meaning of Parliamentary sovereignty: the ‘rule of recognition’ and the contemporary British state

There have been serious and substantive attempts by British constitutional theorists to describe the advanced, modern, political state architecture as eliminating the existence of the rule of recognition. On Bogdanor’s (2009a) argument by drawing a distinction between the old, traditional parliamentary sovereignty and the transition toward popular sovereignty, he asserts that there is a new British constitution with the Human Rights Act at its heart, EU membership since 1973, Scottish, Welsh, Northern Irish and regional devolution and the formation of a quasi-federal (rather than unitary) state, with a reformed House of Lords as primary features of the new constitution. In the view of constitutional state theorists like Bogdanor, parliamentary sovereignty is questionably being consigned to history, the next step being a central written constitution (Bogdanor, 2009a). The rule of recognition has been swept away. Bogdanor adopts a similar perspective to other ‘messy constitutionalists’, again, combining many of the features of the above, such as Anthony King, arguing there is a new British constitution under which “the British parliament is no

longer sovereign”, it is “a legal fiction ... far more fictive than legal”, but accepting we have ended up with a constitutional ‘mess’, often citing the development of the EU (King, 2007, p. 99; see also Mabbett, 2017).

However, although Bogdanor’s primary argument asserts that the Human Rights Act has created a ‘cornerstone’ of a new constitution (Baranger, 2010), by giving more power to courts vis-a-vis Parliament, he displaces the old principle of parliamentary sovereignty, a keystone of a framework underpinning the ‘old’ constitution. From Bogdanor’s ‘popular sovereignty’ perspective, the modern theory of a popular constitutional state directly seeks to affirm the primacy of electors as delegating their representatives in the representation process at the expense of the doctrine of parliamentary sovereignty. Rather than viewing the electorate as steering and directing the exercise of parliamentary sovereignty in the recognised helm, it makes the people themselves sovereign. For Bogdanor, on the British model, those who enjoy the right to make political decisions are empowered to do so by virtue of the representative mandate they have received from the electorate. The direct ‘popular sovereignty’ representation attempts to misconstrue the parliamentary relationship between electors and trustees.

The next step in moving away from Hart’s rule of recognition in Bogdanor’s (2009a) constitutional state is towards an entrenched and written constitution. A substantive aspect however of this move is “a quasi-federal territorial separation of powers between Parliament and the European Union” (Drewry, 2012, p. 533). While it is clear that Parliament has delegated a swathe of law-making powers to the EU, the suggestions of steps toward a written constitution seem unproven. It appears that the entrenchment of EU law has not led to the decaying of parliamentary sovereignty, as Bogdanor holds, in line with the radical version of the common law tradition. He argues EU law has become entrenched and not merely incorporated (Bogdanor, 2012, p. 184) but that has remained significantly contested because Parliament can only impose upon itself, not substantive limits, but limitations of “manner and form” i.e. courts only accept as law that which has been made in the proper legal form. The constitutional state view has, in other words, led to an exaggerated view of the binding nature of EU obligations. For Parliament to impose substantive limits upon itself it would have to alter its wider rule of recognition (see Goldsworthy, 2012, contra Bogdanor, 2012). An alternative view presented in this thesis is that the existence of the Hartian rule of recognition is dependent upon historical precedents. While it is disputed that the European Communities Act is viewed as directly affecting the Hartian rule of recognition in the UK, as Bogdanor asserts, how can that

occur by the legal entrenchment of that Act? It was a voluntary Act, passed by Parliament in 1972, and amended in similar vein, all perfectly consistent with the rule of recognition. So equally would its repeal by parliamentary enactment, for example, through the Repeal Bill. It might be accepted that a rule of recognition can be indirectly changed, but only by a change in the underlying historical precedents which determine the UK constitutional structure. The Hartian rule of recognition is as much political as legal. The fundamental point about parliamentary sovereignty is that the restriction and extension of powers which enable that form are not an exercise in the recognition of other, deeper, more fundamental principles of morality or common law principles which Bogdanor (2009a) strongly relies upon, because as Loughlin (2010) notes, those factors may mediate the sovereignty claim but the claim itself is rooted in deep-seated political conditions (Loughlin, 2010, pp. 236-7).

The meaning of Parliamentary sovereignty: the ‘rule of recognition’ and the common law

Radical common law constitutionalism has provided a rationale for the abandonment of a rule of recognition when explaining parliamentary sovereignty and a brief response to that theory is necessary. In the law court system itself and legal constitutionalist circles, the meaning of the Diceyan definition has in recent years been widely questioned by common law constitutionalist radicals, including at the highest level by Government ministers (Foreign and Commonwealth Office, 2010, p. 40; European Scrutiny Committee, 2010; Goldsworthy, 2010, pp. 14-5). Senior judges such as Lord Steyn maintain that “...the supremacy of Parliament is still the general principle of our constitution. The judges created this principle ...” (Lord Steyn (*R v Secretary of State for the Home Department, ex parte Pierson* [1998])). Lord Hope states, “Step by step, gradually but surely, the English principle of the absolute sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified . . . The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based . . .” (*Jackson v Attorney General* [2006])). The radical common law tradition holds parliamentary sovereignty is founded on a common law foundation (Holdsworth, 1937) – and this has a strong relationship with the proposition that parliamentary sovereignty has been limited by EU law (see Young and Gee, 2016).

It mistakenly asserts that legal supremacy in the British constitution is understood as a rule of the common law, which, was created and may be altered by the courts. It assumes that the judges become superior to Parliament (Goldsworthy, 2010, p. 15). This “minority” view held among a “small handful of judges” (Young and Gee, 2016, p.15) explicitly asserts, however incorrectly, the power of the courts in making Parliament sovereign. This argument must be scrutinised because:

- the law of judges is not a substitute for politics;
- it misinterprets the historical foundation(s) of parliamentary sovereignty as having singular common law roots and;
- political decisions in a parliamentary democracy ought to be made by representatives who can be removed (Tomkins, 2010; Griffith, 1985).

Rather than consider a broader ‘rule of the recognised helm’ in explaining parliamentary sovereignty, common law radicalism asserts that Parliament’s sovereignty is to be treated as a product of, or controlled by, judge-made common law (Allan, 2013; Foreign and Commonwealth Office, 2010, p. 40; *Jackson v Attorney General* [2006]; Lord Steyn [1998]). Dicey’s definition of parliamentary sovereignty and the contemporary employment of that definition in the neo-Diceyan tradition is accepted in the mainstream, albeit with increasing reservation in law and legal theory and “hotly contested” by the jurisprudence common law arguments of TRS Allan (2013). Common law interpretation to this extent only fails in its understanding that ultimate parliamentary sovereignty has not ever historically been comprehensively understood as the creation of that system (Tomkins, 2010; Goldsworthy, 1999, pp. 247-8).

While a narrow band in the legal literature on the subject appears to accept some form of limitations as undermining the ultimate rule in its very character, it is not obvious that all those conditions merely become limits or boundaries upon legal or political supremacy (contra Allan, 2013, p. 140). As with Bogdanor (2012), there is an amplification of ‘manner and form’ limits, in which courts only accept as law that which has been made in the proper legal form, as substantive limitations upon legislative supremacy. This has opened the way both for inaccurate notions of the voluntary European Communities Act 1972 substantively and legally limiting Parliament, not to mention the neo-Diceyan weakness of simply equating parliamentary sovereignty with legal supremacy (e.g. Bradley, 2010; Allan, 2010). The Act, it is claimed, enabled Parliament to bind its successors (Allan, 2010; Wade, 1996). Given Hart’s understanding of the official

consensus to maintain the rule, it is not credible, or at least, very radical, to suggest that all the various contested norms, customs and connections should result in the ultimate rule being viewed as ‘indeterminate’ (e.g. Allan, 2013, p. 154; Tucker, 2011). Most historically precedented, political conditions or constitutional conventions have a reflexive, not necessarily conditional or causal role, in altering the rule (for example, see a legal positivistic account of that view in Jaconelli, 2005). Furthermore, there is little to no evidence to suggest that there has been a contemporary, measurable change in the consensual understanding of British legal officials that judges do not have the authority to declare a statute invalid (Goldsworthy, 1999, p. 253). That challenge to a form of judicial sovereignty is, however, not to deny the role and status of political sovereignty, or understanding how historical precedents have shaped parliamentary sovereignty.

The rule of recognition does not derive its validity from *judicial* interpretation of the underlying principles of a political theory, as Allan maintains – which would place judges in a politically superior place to Parliament in the constitution – but from its capacity to express the conditions which will enable all other rules to impose obligations as valid law, consistent with its historically precedented political conventions. The assertions by judges of deeper principles of political morality behind the rule of recognition, including principles derived from EU case law, not only represents the discourse of judicial supremacy – as against parliamentary sovereignty. It also conflates common law principles (e.g. liberty and justice) as being more fundamental than the most ultimate rule. As Tomkins suggests, legal constitutionalism has viewed law as an activity that is not only distinctive from but also superior to politics (Tomkins, 2005, pp. 11-14). That ‘politics bad, law good’ approach favours the courts. It has failed to acknowledge ‘the political’, or its supremacy. The arguments of Loughlin (2010), Tomkins (2005; 2013), Griffith (1979; 1985), Bellamy (2007) and others are crucial to political theory for different reasons but primarily because they address the centrality of politics – of contestation, of parliamentary dispute, of wider disagreement – in the UK’s constitutional regime.

This approach will not address the specific debate about the direct legal issues implied in the UK legal sovereignty-EU debate, focusing on the repeal or invalidating of one Act of Parliament with another (Craig, 2011, pp. 112-3), which in itself is more aligned to the question of the role of judicial decision-making in the application of Acts of Parliament and the doctrine of ‘implied repeal’, which will only be considered here in passing. These debates have been widely represented by the traditionalists such as H.W.R.

Wade (1996) in contrast to the 'New View' of Sir I. Jennings (1957), RFV Heuston (1964) and G. Marshall (1957).

It should be briefly considered that the school of common law radicalism with its questionable abandonment of rule of recognition asserts that Parliament's sovereignty is to be treated as a product of, or controlled by, judge-made common law and has advanced several arguments originally introduced by the moral constitutionalist tradition. 'Moral constitutionalists' such as Ronald Dworkin (1977, p. 24) and neo-Dworkinian theory have asserted that Hart's ultimate rule of recognition, as a rule, does not exist in an 'all or nothing' fashion; the legal system instead consists of legal principles which should be assigned a metaphorical weight relative to other principles, on the basis of broadening the scope of judicial interpretation. Allan's interpretation is 'broadly consistent' with Dworkin's view of interpreting law in balance with its moral justification (Allan, 2013, pp. 20, 340; Loughlin and Tschorne, 2016, pp. 13-4). It thereby subverts parliamentary sovereignty by mischaracterising the pre-existing Hartian relationship which exists between rules and conditions. Although this thesis will respond throughout to Allan's (2013) arguments, it departs from Dworkin's theory, which unlike Hart's, believes that legal principles rather than rules (Hart, 1997) and rather than sovereigns (Hobbes) are the foundations of the legal system. Dworkin held that judges must look to how they interpret principles, including value judgements, rather than simply obey rules when applying the law. Dworkinian theory generally takes a substantive leap in divorcing principles (moral or political) from the ultimate rule. It has been adapted for example to explain parliamentary sovereignty more as a principle than a rule, to be balanced against competing principles (McGarry, 2012) as if it were some flexibly-based principle balanced against higher justifying moral principles (Dworkin, 1977). It has subsequently been connected with the common law position, through its assertions that courts do not judge Acts of Parliament simply in balance against any other principles but on the basis of judge-decided competing principles derived from the common law (McGarry, 2012, p. 598). Nevertheless, Dworkin helpfully recognised that Hart concedes that an ultimate rule can impose obligations as law enacted by particular institutions e.g. parliament, but rules established by custom also (Dworkin, 1977, p. 41). Customs can count as law even before the courts recognise it (Dworkin, 1977, p. 43). In theory, then, certain political conditions and customs e.g. previous historical precedents, which are not necessarily legally binding could then provide the conditions for the ultimate rule.

The Dworkin conviction that a fundamental rule derives its legal validity from a broader, underlying political theory is entirely plausible. However, it is a leap to then adopt a theory which requires a look beyond constitutional rules to judge-decided deeper underlying principles when applying the law. It is an even greater leap still to reject the rule of recognition (i.e. parliamentary sovereignty) for being inconsistent with those deeper principles. Politically, the UK constitution does not designate judges (unelected) to cherry-pick supposedly deeper underlying principles of the rule of law to diminish the rule of parliamentary sovereignty and with it, the selective weakening of the capacity to represent the wishes of the electorate. They have not constitutionally had the power conferred upon them and are not likely to at any future point; but in practice, the incorporation of EU procedure into the UK constitution has enabled the judiciary to at least attempt to achieve such powers.

But ultimately Dworkin cannot accept a reconsideration of the rule of recognition. Loughlin (2010) rightly points out that the parliamentary sovereignty form and the restriction and extension of powers which enable that form demonstrate that it is not an exercise in legal logic or the recognition of fundamental principles of morality, according to moral theory, as those factors may mediate the sovereignty claim but the claim itself is rooted in political condition (Loughlin, 2010, pp. 236-7). Dworkin's theory is no doubt useful to common law judges assessing interpretation, but it is not useful for political theory to have dismissed the role of the rule of recognition according to Parliament its sovereignty simply on the basis that the rule must be exercised in balance, or mediated, with other deeper, moral principles.

Political constitutionalism: returning to the rule of the recognised helm

The rule of the recognised helm is necessary because it is a fundamental rule of government which is recognised and practised by persons serving a purpose in the institutions of the state architecture. It is not fundamental because it simply exists – it must be recognised by them as providing for valid law and political settlement. It is not fundamental because it is recognised by only the parliament, courts or people or government but consensually recognised and steered by all of them. As a departure from Hart's (1997) rule of recognition, it is a helm which defines the relationship of political

actors, and those of the executive, the legislature, the judiciary and the electorate, in their tacit consent/recognition of a rule providing for sovereignty.

Why should it be necessary to equate the recognition of the rule of sovereignty with *only* the law of Parliament (Dicey, 1964) or increasingly the recognition of statute by the common law of the courts (Allan, 2013) or increasingly by the people (Bogdanor, 2009a)? The central place of representative, parliamentary government which affirms the ultimate rule of ‘What the Crown in Parliament enacts is law’, at the very least, begins to express the supreme role of the legislature, as elected by the people, but also a subsidiary role of the judiciary, and their elected government, in providing recognition to the rule. Why put substantive limits on the institutional location which parliamentary sovereignty is recognised by, given that:

- Dicey (1964) recognised Parliament as foundational, but only in so far as it made law, and not in terms of its political primacy.
- Allan (2013) overstates the courts as having a leading role in establishing Parliament’s sovereignty.
- Bogdanor (2009a) describes the people under the Human Rights Act 1998, through ever-growing local government and regional, devolved and federal units, as holding the key to where sovereignty is located.

It is unnecessary to hold one sole actor as key to recognising the rule of Parliament’s sovereignty, when the executive, the legislature, the judiciary and the electorate must each play their part in upholding the rule. The rule of the recognised helm ought to express a more fundamental rule to be practised by persons possessing a purpose in the institutions of the state.

The conceptualisation of politics, historical conventions, precedents and political conditions in relation to the rule of the recognised helm is vital to an alternative, new approach and the content of this thesis. Loughlin (2010) recognises that importance when concluding that in the British system, an investigation into constitutional understanding requires an investigation into the constitution of the state. The quest for constitutional understanding requires both analysis of the rules of positive law within an appreciation of the conditions of *droit politique* (Loughlin, 2010, p. 272). It is possible to understand the constitution of the state as *droit politique* (Loughlin, 2010, pp. 231-7) in which the constituent elements of the public sphere embedded in historical customs, precedents and practices sustain the ordering of the state. The *droit politique* has a generative function in

which the directing ideas sustain the institutions of government and institutions make legal and constitutional rules (Loughlin, 2010, p. 233, in citing the French public lawyer Hauriou's idea, although Hauriou denies legal rules can make institutions). It provides the key to understanding the constitution of the state. Understanding parliamentary sovereignty in terms of a political constitutional model enables it to be viewed through an explanatory framework within which to make sense of our constitutional self-understandings (Gee and Webber, 2010), be it political or legal.

To move towards a rule of the recognised helm, Hart's ultimate rule of parliamentary sovereignty must consider the positive and political nature of the rule of persons within the helm of the state. The medieval state, which will be interpreted in Chapter 3, examines how in Henry de Bracton's view, sovereignty at the helm was bound to moral duty but ultimately, the law and the law-making sovereign remaining mutually conditioned, reciprocal and interdependent at the helm, even though the sovereign power retains the power to govern the realm (Kantorowicz, 1957, pp. 153, 155). This has a deeper relevance to a modern constitution with multiple actors, from agencies, the EU through to enhanced judicial bodies. In contemporary political theory, Richard Bellamy (2007) persuasively makes the point that if government is by definition the agency authorised by law to issue laws, the rule of law can barely constrain the rule of persons. For Bellamy, at some point, some body of persons, judges or politicians, must decide for example if a government has breached rules (Bellamy, 2007, p. 56). After all, Parliament in the form of the Commons reflects the people. Bellamy's view is certainly attractive because it addresses the 'circumstances of politics' in a theory of political constitutionalism. On the other hand, it overlooks Hart's ultimate rule as a fundamental rule on which it is assumed there is already an acknowledged consensus between officials/persons within those different institutional parts (as described by Goldsworthy, 1999, p. 253; Hart, 1997).

In the demotion of the commanding power over the law and of governing at the helm of state in explaining parliamentary sovereignty, much is being dismissed of how parliamentary sovereignty exists in the political constitution. This thesis reaffirms the relevance of the political constitution to parliamentary sovereignty because the legal definition of parliamentary sovereignty:

- marginalises those who exercise political power to hold to account through political institutions i.e. namely, Parliament.

- is dismissive of that which is ‘political’ characterized by divisive debate, conflict, disagreement, messiness, and as-yet unresolved chaos.
- gives great weight to judicially enforceable limits on the legislature which fail to recognise the deeper politics of rights claims, nor see that law is neither separate nor superior to politics (Griffith, 1979).
- Is dismissive of the procedures in which political decisions should be taken by politicians as responsible and accountable representatives, not judges, simply because they are electable and removable at the ballot box and are accountable to Parliament throughout their tenure (Griffith, 1979).
- Provides insufficient recognition that both law and politics are to be understood by deference to ‘the circumstances of politics’, so that there is a common framework or decision or course of action on a disputed matter, despite disagreement about what the best possible decision might be (Waldron, 1999).
- Overlooks the role of political life in the British often adversarial, political system and political party competition, and the use of majorities to provide settlement and/or agreement, as more defining features of the political constitution, explained by theorists such as Bellamy (2007) and Tomkins (2013).

The centrality of the political constitution proposed by Bellamy (2007), Tomkins (2013) and to an exaggerated degree, Griffith (1979), is a fundamental point because at the heart of UK parliamentary sovereignty is the capacity of voters at free and fair general elections to elect their chosen representatives to the elective part of Westminster, the House of Commons, and thereby to have MPs decide on the laws and policies by which they are to be governed. In pursuance of that task, electors primarily affirm that stabilising Hartian social rule of the constitution within the wider political system. Directly and practically, in polling stations, they enable constituency representatives to represent their general wishes in accordance with manifestos, as open to all UK voters. In that exercise, they also affirm their individual freedom of choice within the political system to choose their representatives and the policies and laws which will affect their everyday lives, and ultimately answer the question of who governs the UK. It is their power to choose and send to Westminster an elected representative (and therefore perhaps remove an incumbent one) to make law in accordance with their general wishes. That sovereignty adheres to older, medieval understandings of the state particularly where it relates to stability and the maintenance of the balance of power as well as more modern ideas of parliamentary democracy and of guaranteeing individual and political freedom.

Whereas Tomkins (2013) puts ministerial responsibility to Parliament at the heart of the political constitution, it is Bellamy's emphasis on the legislature's law-making function, legislative votes by majorities, and institutionalised party competition (Bellamy, 2007) which is more fundamental to the political constitution in which parliamentary sovereignty operates. The claims Bellamy (2007) makes to that being a democratic constitution or reinforcing 'political equality' can be more difficult to justify. It does reaffirm the essential and elective nature of political institutions, including Parliament, acting through very ordinary political and legislative processes to determine its sovereignty. Finally, by recognising in this thesis that there is a legal rule of recognition although it exists within a deeply political helm of the state, I share Loughlin's (2010) and to a degree, Tomkins' (2013) concern for a 'polarized opposition' between a political and legal constitution and by developing the idea of a rule of the recognised helm also intend to move beyond that concerning dualism.

The following chapter (Chapter 3) will develop the claim that a 'rule of the recognised helm' is essential to understanding parliamentary sovereignty, as both a legal and political concept, by explaining how that essential sovereignty deferred to Parliament has been made historically operable in different historical constitutional forms. If there is to be a Hartian ultimate rule which provide the conditions another rule must satisfy in order for that rule to impose obligations as valid law and political settlement, it must be necessary to provide the historically precedented conditions of the social rule. The third chapter is devoted to the innovative identification and explanation of eight historical constitutional forms for that purpose, beginning with 'What the Crown-*with*-magnates enacts is law' (1200-1350) through to today's constitutional form, 'What the Crown-*through*-Parliamentary political elite with external bodies enacts is law' (1973-present). Today's Parliament retains its theoretical sovereignty because it has the power to terminate or change that membership by repealing or amending the European Communities Act 1972 (Tomkins, 2010) and yet the 44-year practice of choosing not to terminate or change substantial aspects of its Parliament-diminishing EU membership has been thought to have left parliamentary sovereignty intact. Parliament is sovereign, then, not because of general judicial or popular 'say so' but because it is a historically institutionalised rule of the recognised helm which is dependent upon the customs, conventions and politics of past historical precedents.

Chapter 3: The eight historical constitutional forms defining the rule of the present day ‘recognised helm’

In making the claim that a ‘rule of the recognised helm’ is essential to understanding parliamentary sovereignty, as both a legal and political concept, it is necessary to also draw the necessary conclusions of how that essential sovereignty deferred to Parliament has been made workable at different stages. After all, if there is to be a Hartian ultimate rule which provide the conditions another rule must satisfy in order for that rule to impose obligations as valid law and political settlement, it must be necessary to provide the historical conditions of the social rule. Below, it is briefly set out how a series of eight historical constitutional forms describing prominent historical features help to frame multiple forms of the rule providing for parliamentary sovereignty:

- (i) ‘What the Crown-*with*-magnates enacts is law’ (1200-1350)
- (ii) ‘What the Crown-*with*-Commons enacts is law’ (1350-1532)
- (iii) ‘What the Crown-*through*-Parliament enacts is law’ (1533-1602)
- (iv) ‘What the Crown-*with*-disputed Parliament enacts is law’ (1603-1687)
- (v) ‘What the Crown-*in*-regulating Parliament enacts is law’ (1688-1689)
- (vi) ‘What the Crown-*in*-mixed constitutional Parliament enacts is law’ (1690-1790s)
- (vii) ‘What the Crown-*in*-Parliamentary Cabinet enacts is law’ (1800-1972)
- (viii) ‘What the Crown-*through*-Parliamentary political elite with external bodies enacts is law’ (1973-present)

This thesis innovatively identifies eight historical constitutional forms for that purpose, each of which illustrate the different meanings attributed to the rule of the recognised helm, from its inception to its contemporary context, in a partly episodic, partly tangential but partly continuous approach. The ‘Crown’ powers previously exercised by the reigning monarch have been passed, in the present day, to the ministers of the executive who now exercise most of those powers; the Crown powers are now exercised by the executive through, and on the advice of, ministers accountable to Parliament (Jack et al., 2011) and in so far as the executive retains the confidence of the MPs in the House of Commons.

In terms of sovereignty involving the modern Crown in Parliament, law and the political community, it is then argued that the modern concept of parliamentary

sovereignty has been left with an entrenched quandary in the meaning of its today's eighth historical constitutional form. An executive-led Parliament delegates a part of its law-making capacity to other bodies / institutions who then impose external control, steerage and direction upon that law, so that those representatives who are elected to the House of Commons by the political community to make law no longer have that practical capacity, since its everyday capacity or competency, but not ultimate right, was voluntarily ceded under the European Communities Act 1972. An elective, delegated Parliament is in a political sense a contradiction. Parliament retains its ultimate sovereignty because it has the power to terminate or change that membership by repealing or amending the European Communities Act 1972 (Tomkins, 2010) and yet – despite the growth of popular and parliamentary British Euroscepticism (Curtice, 2017b; Geddes, 2016, p. 265; Gifford, 2014; Gifford, 2008) – so far, the 44-year practice of not terminating or changing substantial aspects of its Parliament-diminishing EU membership has been imagined to have left that doctrine of parliamentary sovereignty intact.

Finally, the helm can better be understood, by adapting Bracton's view, in which sovereignty at the helm of the medieval state in relation to the law remains "mutually conditioned", reciprocal and interdependent at the helm (Kantorowicz, 1957, p. 153, 155). Historical constitutional forms provide for precedent, by which it is meant that the fingertips of past, historical precedents are pressed into the old, dry sponge of UK constitutional history by past political customs and constitutional conventions, to be compressed, reshaped and reconfigured in reflecting those precedents. Historical constitutional forms characterise features of sovereignty and parliamentary sovereignty which are not simply accrued or aggregated – they thrive, survive, part-survive or completely decay or die, but nonetheless they all provide precedent and convention. The historical conditions of the ultimate rule of the recognised helm can be understood, on Locke's grounds, as customs which are reasonable, and that they support the authority of reasonable legal rules and that there are good reasons for them (Grant, 2012). The rule of the recognised helm therefore exists on the basis that the powers of the executive, the legislature, the judiciary and the electorate are incorporated through their precedented inter-relationships. Those features, as conditions, give the rule existence providing for valid law and political settlement. The conditions are therefore crucial, but by no means causal or restrictive, to the rule. Parliament is sovereign not because it is a principle to be weighed against others via judicial interpretation but because it is an institutionalised rule of the recognised helm which is dependent upon the customs, conventions and politics of past historical precedents.

The specific periodisation of the historical constitutional forms have not been inherited from any one political/constitutional theorist, or historian, in particular. It is however notable that historiographers, political theorists and genealogists have often and similarly, for example, distinguished between ‘parliamentary’ sovereignty in the early Stuart period and post-1688 settlement, between and after the 1530s or even between the pre- or post-European Communities Act 1972 explanations, as each has been bound by substantive and observable constitutional changes. The historical constitutional form conveys the inter-relationships between different types of historical interpretations and the ways in which specific ‘new’ understandings evolve, however unevenly, tangential, episodic or discontinuous from older notions. The historical constitutional forms provide the features at the recognised helm which only exist in that cohesive structure on the basis that the powers of the executive, the legislature, the judiciary and the electorate are incorporated through those historically preceded inter-relationships. The arms of government exist with different functions but the overlapping relationships between the institutions explain the sovereignty formed in Parliament, incorporating the closeness or distance in relationships between the executive, the legislature, the judiciary and the electorate.

Historical constitutional forms are employed to explain the changing, dislocated forms of parliamentary sovereignty which enable further exploration of the relationship between different types of historical interpretations and the ways in which specific ‘new’ understandings evolve – progressively, unevenly or tangentially – from older notions. Each historical form itself summarises features within broad historical thresholds insofar as a ‘threshold’ itself does not denote a prescribed teleology. It is not accepted that those conditions or the ultimate rule itself represents an accrual, or aggregation, or cumulative end-point of a teleological process. It is far more significant than that – the conditions of the ultimate rule provide legal and political precedent.

It has been generally indicated, but never formally established by legal and political theorists or historians that sovereignty can be understood as a historical constitutional form of positive powers, which themselves can be contested in definition during the period and this thesis takes the lead from those historians and political theorists. By focusing upon ‘unbundling’ the historical conditions and conventions that parliamentary sovereignty adheres to and performs within a historical form, the classical divide between European centralisation versus Westminster centralism can be called into question (see Prokhovnik,

2007) and will, in subsequent chapters, help to later understand parliamentary sovereignty in relation to EU membership.

Consistent with Quentin Skinner's contextualism (Perreau-Saussine, 2007, p. 118), the analytical features contained within the historical constitutional forms are only true for the historically situated political actors within the immediate circumstances in which they hold those beliefs or ideals. This contextualism can liberate political theory from the strictly legal hegemonic account of parliamentary sovereignty and how it *should* be understood (see Lane, 2012, p. 74, on Skinner; Perreau-Saussine, 2007, p. 107; Skinner, 1965). The philosophical ideas are inseparable from the historical context in which they occur (Skinner, 2002, contra Clarke, 2013) and by subscribing to a hermeneutic approach, it seeks to attain an objective truth of a given feature in relation to texts (see Burns, 2011). The historical constitutional forms explain what practical work the concept is doing and it thereby underpins the historical normative basis and political contingency upon which its authority is often based. It is ever-changing work in progress. The constitutional forms contain a conceptual system of discourses, which are open-ended and open to the possibility of constant modification (consistent with Prokhovnik, 2008), permitting contestability between the features and other forms, the unexpected, the unintended and malleable political formations. The features of the constitutional forms, partially identified by historians and theorists, are at the same time irretrievably bound to the understanding of the present (see Bartelson, 1995). An attempt to embrace a more favourable innovative, hermeneutic approach which views historical forms as providing for past historical precedents (which can be present) can provide a more formal and deeper level of theoretical explanation of both the historical and contemporary forms of parliamentary sovereignty.

On the matter of historical precedents expressed as conventions, those 'constitutional conventions' are, as Jaconelli (1999) observes, social rules which govern the relationships between institutions of government, Parliament and political parties; they are constitutional in character, non court-enforced and form the interrelationships of the constitution. Although it is not always obvious that we can simply ascertain the binding status or power of a convention on a rule simply via their legal status before the courts, as Jaconelli (1999; Jaconelli, 2005) argues, it can be assumed that the relevance and powers of historical political precedents – otherwise understood in the neo-Diceyan tradition as conditions, constitutional conventions and non-binding, political constraints – to social rules does rely on the changing nature of customs and historical circumstances.

In focusing on the practical mode of organisation, the historical constitutional forms also seek to answer the question – what is sovereignty and where is it located in each historical form? What is its function? The constitutional form conveys the relationship between different types of historical interpretations and the ways in which specific ‘new’ understandings evolve, however unevenly or tangential, from older notions. For example, in seeking a historical understanding of sovereignty in Early Stuart England, as a set of discernible constitutional forms of themes and values, the historian Alan Orr (2002) assesses sovereignty in terms of a practical definition, as a historical cluster of positive or ‘state’ powers, which themselves can be contested in definition (Orr, 2002, p. 475). Orr himself does so to reconsider the concept of sovereignty at the centre of discussion on the origins of the English Civil War. In my view, approaching parliamentary sovereignty can be understood through historical constitutional forms, recast in eight unique narratives, so that each form can be characterised as having internal conceptual connections between its meanings during a defined period. That does not infer a comfortable relationship. The forms can often reflect the political contradictions and dilemmas within a contested political environment.

The historical constitutional forms respond to Bogdanor’s (2009a) claim that constitutions have the objective of ‘providing organisation’ (Bogdanor, 2009a, pp. 53-54), and to that extent forms specify the organisational and relational features of the English or British ‘constitution’ during the different periods. They clarify the functions of the institutions of government and the relationship between them. In each historical form, we specify the interactions within the British constitution which confirms the sovereign powers between political actors and their relationships, particularly in relation to the institution of Parliament.

While theories of the British constitution should seek to understand parliamentary sovereignty relative to the whole constitution (as the common law tradition maintains; see Allan, 2013, p. 23), the constitution can be understood more widely in this sense as a *palimpsest*. The idea of the ‘palimpsest’ in its general understanding is one of “a manuscript written on a surface from which an earlier text has been partly or wholly erased” (Beal, 2008; Baldick, 2008). In the times before paper, it was common in the Middle Ages given the high cost of parchment and vellum. The notion of a reuse of parchment in which the original script was reworked can appeal to analysts and critics of the British constitutional form – it has never been destroyed, introduced in a whole new form, but merely rewritten, redrafted and reworked. The constitutional palimpsest conveys

a process of paradigm-shifting political change, just as Thomas Kuhn's theory of scientific revolutions in *The Structure of Scientific Revolutions* understands how normal science, as the rule, is undermined by revolutionary science, as the exception, after enquiries and realities expose anomalies in the normal science (Kuhn, 1970). The shift in paradigms results from anomalies undermining normal science and revolutionary science becomes the normal science. When David Marquand (1999) assesses Britain's apparent move away from its "old constitution", it is asserted that it never was "the crystalline monolith of Dicey's imagining" but instead, it "... was a palimpsest of sometimes discordant myths, understandings, and expectations, reflecting the changing values and preoccupations of succeeding generations." (Marquand, 1999, p. 3) In so far as critics can accept that understanding of change being reworked in a palimpsest, the concept has some validity. While, for Marquand, the Crown-in-Parliament has proceeded in several forms in the older forms of the constitution, reflecting Dicey's "monolithic" view, it is insisted here that historical forms are simply passing, in the palimpsest, in my view, into another new phase (the eighth constitutional form). The Crown-in-Parliament formulation therefore never really belonged *only* to the old constitution or to Dicey's monolithic view which, for all its faults discussed in Chapter 1, appeared overwhelmingly practical for judges and common lawyers and utilised through both the legal and political establishment. Most importantly, the eight constitutional forms, including the most recent historical form, reinforce Marquand's view of the constitution as a palimpsest. The principles and features of each of the eight constitutional forms described below illustrate the textual redrafting – the political pacts and major legislative and political precedents between each of the features within the forms – which in many ways help to grapple with the historical substance of the constitutional forms.

The making of the present: historical transitions in constitutional conventions and form

Constitutional form one: 'What the Crown-with-magnates enacts is law' (1200-1350)

The understanding of sovereignty as *gubernaculum*, government through the helm of the ship of state, can be first understood from the vantage point of the period of medieval kingship in the centuries preceding the Reformation in the thirteenth and fourteenth centuries (Harding, 1993; Kantorowicz, 1957; McIlwain, 1947), if not more broadly to the

reign of Anglo-Saxon monarch Athelstan (924-39) (History of Parliament Trust, 2015, p. 12). That characterisation is expressed as divine monarchical sovereignty-with-magnates – *divine* in its claim to power and right but in consultation with magnates. In simple terms, the unequal theory of the ‘Crown rules’ model only ever really existed as an alternate model of unequal power – ‘the Crown rules by consulting with magnates’. The Crown’s sovereignty within the helm of the ship of state is checked by barons (originally, the ‘Curia Regis’). The ultimate rule sat in equilibrium with particular political conditions to bolster the rule.

Sovereignty provides a ranked ultimate rule, conferring supremacy on the acknowledged God-ordained power of the Crown, which existed within an embracing condition – the elevating of the magnates to create a more powerful authority than the Crown could possess alone. The word ‘parliament’ is itself first used in England in the thirteenth century to describe the broad meetings of the monarch’s counsel with barons, bishops and prominent royal servants, advising the Crown on law-making, administrative matters and to assist in judicial decisions (Payling, 2013; Jack et al., 2011). The divine power behind the Crown-magnate power concept described in this historical constitutional form can be explained, in the writings of the judge Henry de Bracton (1210-1268), that the Crown is held under God and under the law, understood as moral duty, consistently pursued in accordance with his own goodwill, reinforced by baronial counsel, but importantly acted upon under the threat of divine retribution (see Van Duffel, 2004, pp. 157-8; Goldsworthy, 1999; Nederman, 1988; John Wyclif, 1378 in Nederman and Forhan, 1993, p. 223; see Baumer, 1940, p. 57; McIlwain, 1910, p. 97). The capacity to govern through the Crown’s sovereignty at the helm of the medieval state, was only bound to natural and divine law as moral duty – but “above the law” in his status as Crown, by prerogative power, unconstrained by positive law (Goldsworthy, 1999; Kantorowicz, 1957, p. 149). Ultimately, for Bracton, the law and the law-making Crown were “mutually conditioned”, reciprocal and interdependent at the helm, even though the Crown retained the power to govern the realm (Kantorowicz, 1957, pp. 153, 155).

The Crown was the undoubted pinnacle of a legal system, the heart and essence of the English political system – and his law “eternal like the stars” (Van Duffel, 2004, p. 156; Bradford, 2011) – but it is with the combined role of the earls that his power is really buttressed. As Donald Hanson maintains, “... the answer of the great twelfth and thirteenth century law books to fundamental questions was that such matters lay with the monarch and the magnates of the realm” (Hanson, 1970, p. 180). Parliament developed out of the medieval convention of baronial counsel, it was the ‘Crown’s Parliament’, the Crown

being forced to accept its importance (on the former point, see Goldsworthy, 1999, p. 28; on the latter point, see Bradford, 2011). Sovereignty had already developed through political institutions, depersonalised from the physical persons embodying political authority (Bartelson, 2011). That ‘royal’ power exercised by the sovereign which allowed the Crown to do as she pleased insofar as it was consistent with fundamental law, was an earl-reinforced power of the Crown, not any ‘joint’ parliamentary power as such. Such a view does not conform to a divine-right theory of the Crown because under medieval kingships, it was only possible to affirm a ranked ultimate rule, conferring supremacy not merely on the Crown, as such, but the buttressing of the Crown’s ultimate authority by the earls. Magna Carta of 1215 began to codify the means by which the Crown should seek counsel (Nelson, 2015a). Simon de Montfort’s parliament of 1265 shows knights and townspeople could be called upon to advise on questions of the realm in the Crown’s name (Nelson, 2015b; History of Parliament Trust, 2015, p. 21). This reflected a broader structure of authority and not solely with the Crown, nor sovereignty within Parliament *per se*.

Sovereignty performed a function within the helm of the ship of state. Sovereignty was exercised through the use of baronial counsel to raise taxes for ‘defence’ of territory and pass law to dispense justice (Bradford, 2011). The sense of sovereignty as the power of the Crown to command and make law, is not given primary status as the conditioned Crown-earl sovereignty is primarily achieved through the instrumental control of wealth and nobility and political actors within that realm. That control is pursued in order to defend or gain territory and achieve war through taxation and only secondarily, enable law to satisfy those assenting barons from the shires and boroughs. Sovereignty did require the perceived claim to ‘unified’ representation (not democratic) and was developed by the 1260s into the ‘quid pro quo’ principle of the Crown maintaining broader consent and representation from localities because of the necessary taxation for Crown revenues and war (Payling, 2013; Norton, 2013, p. 18; Bradford, 2011; see also Payling, 1999, p. 241).

The formula in the first constitutional form of ‘What the Crown-with-magnates enacts is law’ (1200-1350) in balance with overtly political powers, is at odds with the neo-Diceyan view. It is overtly concerned with political power. The sovereignty is affirmed by a ranked ultimate rule, that is a supremacy of the acknowledged Crown-with-magnates. That sovereignty by its ultimate rule performed a function within the helm of the ship of state – it was exercised through the consent of baronial counsel to raise taxes for defence of territory and pass law to dispense justice (History of Parliament Trust, 2015, pp. 12-17). The rule at the helm of the ship of state required the perceived claim to representation for

the governance of the realm. The understanding of the commanding power of the Crown to make law, is not given primary status because sovereignty is achieved through other means and only in its finale, to give law to satisfy those assenting barons from the shires and boroughs.

Constitutional form two: 'What the Crown-with-Commons enacts is law' (1350-1532)

In the second constitutional form, the characterisation of parliamentary sovereignty which developed in the pre-Reformation period is geared towards a petitionable Crown in Parliament with representatives. The ultimate rule that the Crown rules with an occasional and separate counsel transforms into a Crown ruling with an increasingly relevant Commons. It became the high crossroad of power networks, an unparalleled rendezvous point, where Crown and Parliament could barter in interests, power and money. Fortescue's (1395-1477) then leading assessment of England's *dominium politicum et regale*, as government being both political and regal, signifies the essential character of the Crown needing to rule with the parliament to gain consent (Koenigsberger, 1978; Koenigsberger, 1989). The ultimate rule required particular political features, including the representation by petition and impeachment of officers (History of Parliament Trust, 2015, p. 20), to make the rule a reality.

The meaning of sovereignty as the ultimate rule expressing the legitimate authority gained through the conditional exercise of a petitionable sovereign was already well-formed in the first constitutional form or by 1341 at least (see Norton, 2013, p. 18), and developed under extended modes of representation. Those steps tipped the balance from monarchical sovereignty to the Reformation's conditions necessary for some degree of parliamentary rule. In this constitutional form, defining parliamentary sovereignty in terms of the Crown relative to the fast-developing but poorly-attended Parliament meant a fuller Commons and Lords having developed from substantial political changes, including the widening basis of county- and town-representing (see Quinault, 2012; Goldsworthy, 1999). Shire representatives 'represented' those in 1430 with an annual income of at least 40 shillings and with freehold land (History of Parliament Trust, 2015, p. 24; Payling, 1999, p. 244). Although not in the English tradition, Marsiglio of Padua's *Defensor Pacis* in the fourteenth century is a good European example of law-making by a loose quasi-representation – it provides a basis for the singular authority for the creation, alteration and revision of law as the *legislator humanus*, which is composed of the whole body of citizens

(Lee, 2009; Nederman, 1991, p. 23).

Sovereignty existed in the sense that Parliament marginally began to exercise its own power and influence, for example, through the depositions of monarchs (History of Parliament Trust, 2015, p. 20, 22) so that factions of magnates from the realm arranged for validation of the removal of a monarch (such as Richard III in 1485) by parliamentary assent (Jones, 2012, p. 24). During the constitutional upheavals of the fifteenth century involving the depositions of monarchs, leading to fifteenth century monarchs desiring parliamentary validation of the title to the throne, there is a great deal of evidence testifying to the highest authority attributed to a Parliament representing the entire community (Goldsworthy, 1999, p. 31). In discourse, however, neither Parliament nor Crown sought to guarantee claims to 'exclusive sovereignty' (Baumer, 1940, p. 3).

There is an acceptance of the condition that the Crown, within the Parliament, was equated with the highest law-making authority, signifying the equalising of government with the ability to legislate. The supremacy of the English Parliament in making the highest law continued to be accepted and expressed among the essentially conservative political, royal and lawyerly elite of the period (Baumer, 1940, p. 3). The prevalence of natural or fundamental law also meant that there was no theory of 'absolute monarchy' (Baumer, 1940, p. 6). Fortescue who served as a Member of Parliament, Chief Justice of England and Lord Chancellor, saw that the entire body of the realm according to the laws of England was represented in Parliament (Goldsworthy, 1999, p. 41). England enjoyed *dominium politicum et regale*, not merely *dominium regale*, the government being both political and regal and the Crown by himself unable to change the law of the land (Baumer, 1940, p. 10).

The formula in the second constitutional form of 'What the Crown-with-Commons enacts is law' (1350-1532) in balance with particular political conditions and constitutional conventions is inconsistent with the neo-Diceyan view. Sovereignty as an ultimate rule expressing the legitimate authority gained through the conditional exercise of a petitionable sovereign was acknowledged. It is founded around the extension of representation to the 40 shilling per annum landowners. Parliament had developed its own power, influence and independence which, although not exclusive, signifies the increasing equalising of government as the power to legislate, realised as the Crown located within a politically subordinate Parliament as the highest legal authority.

Constitutional form three: 'What the Crown-through-Parliament enacts is law' (1533-1602)

Although in the Reformation period, the real fundamental question that remained, given that the rival Crown *versus* Church supremacies had been addressed after 1533 was that England had been left with a self-regulating Church separated from a Parliament which is sovereign (Bogdanor, 1997, p. 225). It confirmed the assumption of legislative sovereignty by 1539/40 (see Keir, 1968, p. 117, Goldsworthy, 1999, p. 55). That also confirms Parliament's omnicompetence – that no area involved in the government of realm was outside its authority. The sovereign working through the omnicompetent Parliament of the sixteenth century helped to define the meaning of parliamentary sovereignty. The omnicompetence is important because it conveys how close the Parliament was coming to independence and a wide stable of functions, in the service of the power it sought.

In the third constitutional form, the ultimate rule that the Crown rules with a Commons transforms into a Crown needing to rule through Parliament. The ultimate rule of 'What the Crown-through-Parliament enacts is law' (1533-1602) required equilibrium with the political features, including that omnicompetence, to make the rule a reality. It was maintained widely by the political elite of the period that the Crown in Parliament indisputably had legal omnicompetence (e.g. Keir, 1968, p. 135; Baumer, 1940, p. 1). While sovereignty as government became reducible to the principle of legal competence, there was still a strong sense of its operation outside legal controls i.e. despotic. Under the Reformation Parliament, Parliament was considered the supreme legislator and not held back by other laws or types of law-makers, overriding both the crown and the courts (Seaward, 2013). St German's 'Doctor and Student', first published in 1523, argued that the Crown in Parliament was omnicompetent, able to legislate on both temporal and spiritual matters under the dictum, *jus regale politicum* – and represented the Church. As a defender of parliamentary sovereignty, St German also held that human law was subordinate to natural law (as in medieval political theory, and also, Fortescue, Blackstone and Austin) which was preserved on the basis that Parliament would never seek to violate natural law (Goldsworthy, 1999, pp. 71-2; Baumer, 1940, p. 150-1). The UK Parliament (2014) asserts that the omnicompetence meant that "no area involved in the government of the realm was outside its authority" (see also Elton, 1986, p. 36) and that is viewed as a wholly "unexceptional" view (see also Roskell, 1993; Denton, 1981, p. 88). Sovereignty in this constitutional form is invested in an omnicompetent Parliament, wide in its functions to the extent that Parliament could do anything except the impossible – an issue which

Blackstone (1765) reiterates in his later definition in the eighteenth century.

There was an obvious contestation in the interpretation whereby, despite an absence of a “deep-seated quarrel” about the supremacy of the Crown and Parliament in general, as Baumer argues, there remained significant division about the nature of the authority between Royalist theories supporting Crown-sanctioned statute with the advice and assistance of the Lords, Commons and High Court of Parliament and Parliamentary theories in which the Crown, Lords and Commons in Parliament shared supreme legislative power and collectively represented the community (Baumer, 1940, pp. 143-163). Nonetheless, sovereignty was exercised as authority on the tacitly accepted principle of the lawful taxation by common consent, in addition to the Crown requiring consent for the validity of legislation (latterly, see Baumer, 1940, p. 143). Even in parliamentary theories of the fifteenth and sixteenth century, it was widely assumed that all members of the community were represented in Parliament and the consent of Parliament was equated with the consent of every man (see John Hooker and Thomas Smith, in Dean, 1998, p. 8). The division and competition in Royalist and Parliamentary arguments, nonetheless, strongly suggests that sovereignty as supremacy and provision of an ultimate rule faltered not on the primacy of the Crown-*through*-Parliament but their differing ranking of principles relative to the ultimate one.

Parliament’s sovereignty was predicated upon a basic acknowledgment of the Crown, Lords and Commons in a mixed constitution at the helm of ship of state, combining elements of monarchy, aristocracy and democracy. It was an avoidance device against an excessive concentration of power which would undermine freedom. It owes some debt to the language offered by the Greco-Roman theory of the mixed constitution, particularly the second-century BC, Polybius (Gagarin, 2010), as a checking power of the political body (Bellamy, 1996, p. 441) and a re-interpretation of Aristotle which produced an equating of political rule with a mixed constitution (Blythe, 1992, p. 12). The constitutional conventions of the Lords, Commons and Crown within a mixed government polity of monarchical, aristocratic, and democratic aspects, was a fundamental point in the sixteenth century constitution (Goldsworthy, 1999, p. 75).

The third constitutional form defined by ‘What the Crown-*through*-Parliament enacts is law’ (1533-1602) – reflected the events and Tudor rule during the Reformation, and stood in contrast to the rule and Parliament under the Early Stuarts. The rule in the third constitutional form in equilibrium with its constitutional convention of legislative omnicompetence, is not a neo-Diceyan view. The Crown-*through*-Parliament had legal omnicompetence and while sovereignty as government was viewed through the lens of

legal competence, there was a strong sense of its operation outside strict legal controls i.e. a royal despotic power. The supremacy of the ultimate rule exists but the ranking of principles relating to the Crown, Lords, Commons and the consenting community as a source of power is questioned. There is a wider acknowledging of Parliament's sovereignty as predicated upon the Crown, Lords and Commons in a mixed constitution; the three estates are responsible for the governance of the realm.

Constitutional form four: 'What the Crown-with-disputed Parliament enacts is law' (1603-1687)

The fourth constitutional form's parliamentary sovereignty, formed from great instability and uncertainty during the Early Stuart period, reflected the immense turmoil of the country at large during the period (see Keir, 1968, p. 231). The ultimate rule operated in balance with often irreconcilable political conditions of a 'divine right' theory Crown, the argument that sovereignty rested with the immemorial, ancient common law constitution (Pocock, 1987), and that sovereignty rested with the Crown-in-Parliament, in order to make the rule a reality. The sovereignty constitutional form of the 'unappealable' parliament by the Crown, by common law, or by community, in Early Stuart England and throughout the English Civil Wars is perhaps more divided against itself than under any other form. Under constitutional form four, the ultimate rule that the Crown rules *through* Parliament, because of civil war challenges to sovereignty, develops tangentially into the Crown attempting to rule only *with* a disputed Parliament. However, it is not until the issue is so substantively contested under the fifth form that the principle of the Crown-in-Parliament is proven so fundamental.

First, in this constitutional form, given the dispute over supremacy and ranking of principle, there was a practical (though widely disputed) reassertion of parliamentary theory (Goldsworthy 1999). It made the assertion that God conferred powers of government on the community as a whole – rather than directly on the Crown (Royalist) or that there was some ancient common law constitution (common law) (Pocock, 1987, p. 124). In turn, the community had delegated them to the Crown in so far as he made laws and imposed taxes through the consenting Parliament (e.g. Goldsworthy, 1999, pp. 79-124). The argument for the supremacy of the Crown with Parliament had prevailed after the English Civil War and Cromwell's death although great uncertainty remained in the competing Royalist, Parliamentary and common law narratives. The English Civil War

involving the replacement of the monarch with the Commonwealth of England followed by the Protectorate under Oliver, then Richard Cromwell, demonstrated an important facet of the constitution: the Crown could no longer govern without parliamentary consent. Even within those narratives, there remained disagreement, for example, on whether Parliament was infallible, or final, or unappealable, and whether religious tension was still itself the basis of the tensions over the Crown with Parliament (Orr, 2002).

Second, the competition in political ranking of principle perseveres between the three categories for those who made claims to sovereignty. The political theories explaining the sovereignty of Parliament in early Stuart England, which are by no means mutually exclusive, can be characterised by three different schools, as maintained by theorists such as Maitland (1908, p. 298), who believed that in the first half of the seventeenth century, there were three categories for those who made claims to sovereignty:

- the Crown;
- the Crown in Parliament, and;
- the law.

Those three different schools are essentially elaborated upon in this period as (i) Royalist; (ii) Parliamentary and; (iii) common law defences, whereby in the latter, confusingly, both Crown and Parliament were said to have derived powers from a supposed ancient constitution, consisting of fundamental principles of common law, which regulated the balance between the two and was legally superior to both (Goldsworthy, 1999, p. 78; Somerville, 1986).

Third, Sir Edward Coke in *Dr Bonham's* case undermined the previously acknowledged ultimate rule by upholding in 1610 that statute could be invalidated by the courts on the basis of the common law, right and reason, was a judgement often used to support common law theorists. Coke stated,

"[I]t appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void." (Sir Edward Coke, *Dr. Bonham's Case* [1610])

The radical common law theorists of early Stuart England incorporated Roman law doctrine in which the sovereign's absolute powers were claimed to be derived from

primitive acts of a sovereign people (*lex regia*) and, therefore, sovereignty need not exist or belong to one holder along monarchical lines (Lee, 2016, pp. 289-290).

Within this fourth constitutional form, the understanding of Parliament is extremely divided in the interpretations of the foundational powers underlying the sovereign, of common law and the community in Early Stuart England. The unworkable formula in the fourth constitutional form of ‘What the Crown-with-disputed Parliament enacts is law’ (1603-1687) which required extreme balance with its competing political conditions of Crown, common law or Crown with Parliament, overwhelms the legalistic, neo-Diceyan definition. There was a dispute over ranking of principle of Crown and common law in relation to the supremacy of parliament but parliamentary theory prevailed in practice following the Civil War and the Restoration. Competing claims to sovereignty were made for the Crown, the Crown in parliament or the law.

In contemporary legal and political thought, the recent “renaissance” in those divisions between common law theorists (e.g. Allan, 2013; on that renaissance, see Tomkins, 2010, p. 4) and traditional legal sovereignist views (e.g. Goldsworthy, 1999; Hart, 1997; Tomkins, 2003) continue to feed through into the defence of, and challenges to, Dicey’s traditional definition.

Constitutional form five: ‘What the Crown-in-regulating Parliament enacts is law’ (1688-1689)

Since 1689, the monarchy has owed its title to parliament and the great constitutional struggles of the seventeenth century meant that the royal succession could be regulated by parliament (Bogdanor, 1997, p. 43). Against the Royalist-absolutist schools was an account of parliamentary sovereignty provided in the post-Restoration, pre-Revolution political situation. The fifth constitutional form is an unbundling of ‘What the Crown-in-regulating Parliament enacts is law’ theorised before the Revolution and crystallised in 1688/9 and the political structures which developed out of that ‘first modern revolution’ (Pincus, 2009). The settlement of 1688 and 1689 resolves the dispute of Crown with Parliament to the Crown embedded in and regulated by Parliament. Before the Revolution of 1688, the conflict between monarchists, Parliamentarians, the Whigs and of the latter, John Locke’s view of parliamentary sovereignty – including the supreme legislative within the separation of powers and strongly reliant upon the consent of the political community –

illustrates the redefining of that concept and the political arguments up to 1688 and well beyond (Goldsworthy, 1999, p. 50). Locke and the English revolutionaries of 1688 “created a new kind of modern state” – it did not set a precedent for future politics, but following calls for a free Parliament, “merely reasserted parliamentary sovereignty” (Pincus, 2009, pp. 28, 238-253).

This definition and the previous constitutional form are about the omnipotency of Parliament and Locke’s legislative is a deliberate attempt to unite the *trust* of the community with that Parliament via a balanced and mixed constitution (on the mixed constitution, see Lieberman, 2006, p. 319; Weston and Greenberg, 1981; Weston, 1965); a mix which had been an impossibility under a Hobbesian sovereign unity, centred upon the requirement for the finality of sovereign authority (Hoekstra, 2013, pp. 1080-1; Bourke, 1999, p. 108). The Crown is finally under the powers of the legislature (Wade, 1955), the courts are denied the power to limit Parliament’s sovereignty (Bradley, 2011; Bradley and Ewing, 2010) and the representative claim to Parliament has developed its own independence. The ultimate rule was balanced against the political conditions and constitutional conventions, including that elective trust relationship, in making the rule a reality. That rule-based view of legislating within Locke’s *Second Treatise of Civil Government*, complements his approach toward a Westphalian state (Prokhovnik, 2008, p. 82; Locke, 1988), governed through the supremacy of the legislature, although contemporary Lockean scholars do not accept on the whole the contribution of Locke’s view to parliamentary sovereignty (e.g. Franklin, 1981). Locke’s Parliament is a people-sanctioned ruling legislative power which is consensual, elective, representative, majoritarian and in which the electorate publicly participate on the basis of trust. Accordingly, his view of sovereignty in action is the entrusting of parliamentary law-making by majority representation (*Second Treatise*, 1988, pp. 154, 157, 158).

The creation of the fundamental rule resolved the conflict between the Crown and Parliament protecting the succession and prerogatives of the Crown from statute which crystallised into the Bill of Rights of 1689 and limited the powers of the Crown in relation to parliament, and thereby established a parliamentary monarchy (Bogdanor, 1997, p. 5). Locke’s understanding of the supremacy of the legislative – which, in England’s case, he presented as the Crown, Lords and Commons assembled together – had been predicated on several important assumptions, namely that the trust of representatives in the legislature means that they must duly act in accordance with the consent given to them.

The Lockean and wider liberal tradition referred to sovereignty as being refocused through the tighter definition of a people-sanctioned, law-making legislature. Previously,

greater ruler sovereignty had been equated with the older tyranny; now, law was required to replace the possibility of extra-legal decision-making. By permitting an understanding of parliamentary sovereignty within a framework which accounts for those conditions, it may allow us to focus on Raia Prokhovnik's critical observation that "The liberal tradition in implicit ways redefines political sovereignty in terms of legal sovereignty, reduces politics to the implementation of law, and so works with a depleted notion of what might be called ruler sovereignty." (Prokhovnik, 2008, p. 2)

The fifth constitutional form evidenced an omnipotent Parliament operating on trust with the sovereign during the events of 1688/89. The formula in the fifth constitutional form of 'What the Crown-in-regulating Parliament enacts is law' (1688-1689) requiring balance with key political conditions, and new constitutional conventions, both affirms and reviews the neo-Diceyan definition. The sovereignty is affirmed by an ultimate rule-based view of legislating through a Westphalian state governed by the supremacy of the legislative. John Locke's Parliament is theorised as a people-sanctioned ruling legislative power which is elective, representative and majoritarian and in which people participate on the basis of trust. The creation of the ultimate rule at the helm establishes a parliamentary monarchy. Broad political sovereignty is refocused through the lens of legislative law-making because ruler sovereignty becomes equalised with tyranny and where law replaces the extra-legal decision-making inherent to tyranny.

Constitutional form six: 'What the Crown-in-mixed constitutional Parliament enacts is law' (1690-1790s)

The status of sovereignty as it was stated in the ultimate rule in the eighteenth century reflected the 1688/89 settlement, the 1707 Union and the rivalling of popular sovereignty with Parliament's sovereignty. The ultimate rule requires balance against its political conditions, including a mixed constitution, to support the rule. The Whiggish ultimate rule that the Crown is embedded in and regulated by Parliament prevails and is justified increasingly by the balance of monarchical (Crown), aristocratic (Lords) and democratic (Commons representing people) powers.

The Revolution of 1688 is said to have vindicated the parliamentarian theory of the Whigs and, with it, the view that sovereignty was entrusted to the Crown in Parliament rather than only the Crown (Quinault, 2012; Goldsworthy, 1999, p. 159; Williams, 1962, p.

3; Clark, 1956, p. 150). Eighteenth century theorists appear to be forced to either endorse or reassess that premise. The supremacy conferred by the ultimate rule over the legislative power, as a power which had been derived from the Crown, was generally accepted by legal and political theorists. The most recognised voice on the concept of parliamentary sovereignty in the eighteenth century in relation to the laws of England is Blackstone (1765). In 1765, he wrote of Parliament that it has sovereign and uncontrollable authority. It was an absolute despotic power entrusted by the constitution, and could do anything unless of course it was naturally impossible (Lubert, 2010; Goldsworthy, 1999, p. 202; Blackstone, 1765). Blackstone adopted from Montesquieu (1748) the idea of a balanced tripartite constitution of mixed, separate-but-coordinated powers between the executive, legislature and judicial elements (Lieberman, 2006, pp. 318, 335; Lieberman, 1999, p. 22). In the eighteenth century, it is said that "... the Whig conception of a sovereign Parliament had hardened into an orthodoxy given its classic formulation by Sir William Blackstone in 1765." (Jezierski, 1971, p. 96) An Act of Parliament was the execution of the highest authority of the kingdom. It could bind every subject, including the Crown, and could not be repealed, amended, altered or dispensed with unless Parliament chose to do so. Constitutionally close to Blackstone, Montesquieu's *The Spirit of the Laws* (1748) has a section dealing with the English 'power checks power' constitution (Bellamy, 1996, p. 443) in which the executive and the two branches of the legislative act as checks on one another yet the judicial power and tribunals of law are subordinate to the legislation (Lubert, 2010; Goldsworthy, 1999, contra Jenkins, 2011, p. 577; Montesquieu, 1748). Again, Adam Smith's jurisprudence lectures in the 1760s emphasise parliamentary sovereignty – with sovereignty laying with the Crown and Parliament – "The authority of the Parliament in some things, of the King and Parliament in others" and "in whatever place there is a sovereign, from the very nature of things the power must be absolute" (Bourke, 1999, p. 109). In terms of parliamentary representation, however, during this period and up to 1832, the voter is only essentially a yeoman with a freehold estate with a value of 40 shillings who collectively formed an electorate of a shire (Baskerville, 1998, p. 48; Dean, 1998). The acknowledging of the Whiggish constitutional rules resulted from an elite political consensus in which the Tories accepted that legislative sovereignty belonged to the Crown in Parliament (not the Crown alone) and the Whigs accepted that the people could not be trusted beyond a limited political role (Goldsworthy, 1999, p. 176).

Another important condition, or convention, for parliamentary sovereignty in this context is the idea of a mixed constitution, to preserve political freedom by preventing and checking arbitrary acts of power (see also Kors, 2012; Lieberman, 2006, p. 317), initially

discussed in constitutional form three in the sixteenth century. Blackstone, Burke and many other key political figures in eighteenth century England described the British constitution as being a well-balanced combination of different forms of government – monarchical, aristocratic and democratic – each balancing out the other (Lieberman, 2006, p. 318; Blackstone, 1765, pp. i, 50-2). The meaning of the sovereignty of Parliament for Edmund Burke, like Locke, is located within a balanced constitution configured around a triangulated trust between the Crown and Parliament (see Craig, 2012, pp. 106-8). The mixed constitution was important to Burke, in the 1760s, because “What mattered most to him were the chains of trust that existed between these elements and that were crucial to the effectiveness of government.” (Craig, 2012, p. 108). The constitution was not perfect and historical political circumstances generally reflected a ramshackle system held together by a poorly integrated composite state (O’Gorman, 2012). The Prime Minister and Cabinet also first appeared (Norton, 2013, p. 20) as an early sign of the growth of government. Nonetheless, both Court Whigs and Tories boasted of the equilibrium between the Crown, Lords and Commons (Goldsworthy, 1999, p. 200). Judicial review was in this context not considered necessary for a system in which the Commons claimed to represent the electors and the Crown and the Lords checked that relationship.

A reform movement in the last few decades of the eighteenth century attempted to challenge parliamentary sovereignty, including the arguments of John Wilkes, Thomas Paine and radical Whigs. They had maintained that the people and not parliamentary sovereignty prevailed, until this notion itself was discredited by the actions of the French Revolution and the fears of a French invasion of England by Napoleon. Nonetheless, European conceptions of sovereignty came to rest upon the will of the people (Bartelson, 2011).

The ultimate rule in the sixth constitutional form of ‘What the Crown-*in*-mixed constitutional Parliament enacts is law’ requires balance against its political conditions of the mixed constitution to support the rule. The neo-Diceyan approach gives no direct credit to the mixed constitution in understanding parliamentary sovereignty. The ultimate rule conferred supremacy upon the unlimited and absolute power of Parliament. The rule was fixed by a Tory-Whig consensus, with the Crown-*in*-Parliament, but limited role of the people, exercised within the mixed constitution of the Crown, Lords and Commons. For theorists such as Edmund Burke, a partition of the mixed governmental powers was perfectly consistent with the indivisibility of sovereign authority (Bourke, 1999).

Constitutional form seven: 'What the Crown-in-Parliamentary Cabinet enacts is law'
(1800-1972)

By the nineteenth century, the doctrine of parliamentary sovereignty had been taken for granted by lawyers and political theorists. The ultimate rule that the Crown is embedded *in* and regulated by Parliament prevails and is justified increasingly by the efficient leadership of ministerial Cabinet powers at the centre of the Commons. It is conceptualised as an aristocratically elite representative Parliament making law without external direction. The ultimate rule requires balance against its political conventions, including its representative function and the absence of external direction of government, to support the rule. Sir Thomas Erskine May – whose guidelines continue to be utilised today in Parliament in an updated form – reported in his first edition of the ‘Treatise on the Law, Privileges, Proceedings and Usage of Parliament’ (May, 1844) the legislative authority of Parliament was not subject to limits other than when the people should no longer wish to obey and therefore resist. More straightforwardly, even with a limited franchise, the people could elect a different parliament. The context to the supremacy and ranking of an ultimate rule in this constitutional form is one of a mixed, fluid constitution, with a “plastic power of self-amelioration”, yet whose Whig reformers thought of their reforms “on a trajectory towards democracy” (Saunders, 2011, p. 9). They were, by its fluidity, explaining a seemingly stable constitution against the background of major revolution in Europe in 1848.

John Stuart Mill in 1885 expressed a more liberal, representative, community-bearing, majoritarian-led, Commons-focused theorising of sovereignty, asserting that the ideal form of government which Britain held is that in which sovereignty as the supreme controlling power is held by the aggregate of the community (see Turner, 2010, p. 29; Begby, 2003; see also Goldsworthy, 1999, p. 226). The strong claims to the representative Parliament presupposes a process of internal, domestic representation and thereby an absence, or limitation, on external direction of government.

Walter Bagehot’s Victorian study of what he called the English constitution recognised the ultimate power within the legislative as the single ultimate authority. His executive-in-Commons theory meant that he endorsed legislative sovereignty achieved through fused Cabinet-legislative powers as efficient (Bagehot, 2001). In the English context, the mixed constitution characterised an ‘equilibrium’ or ‘balance’ in the constitution and summed up an essential feature of the seventeenth and eighteenth-century

constitution by a diverse number of political theorists including Montesquieu (1748), Blackstone (1765) and Burke (1774). However, for all its sworn primacy, Walter Bagehot, his disciples and many other theorists in the nineteenth century insisted not on the antiquated doctrine of the mixed constitution (Francis and Morrow, 1994, p. 10) but that within the constitution, the Cabinet was the central institution of British government, set within the fusion of legislative and executive powers, and not their separation or mix (Bagehot, 2001). Bagehot's Commons had that efficiency and despotic formality to conclude an issue without external requirement/ obligation and internationally sovereignty was exercised through quietism and restraint (see Clinton, 2003). The interest in efficiency made Bagehot and others less concerned with any notion of a balanced, mixed constitution of checks and balances or the claims to liberties delivered through an ancient constitution (Francis and Morrow, 1994, pp. 10, 23). Internally, Bagehot maintained that the executive and legislative powers were not separate: the role of the Cabinet as ministers meeting along with Members of Parliament in voting legislation through under minister-instructed party lines meant a fusion of centralised powers at the heart of the legislative (Bagehot, 2001). At least the British had stable and efficient government (Colls, 2007, p. 518) and he underlined the requirement of popular assent and fresh election to establish the absolute nature of parliamentary sovereignty. In general terms, the major justification for the doctrine of parliamentary sovereignty was Parliament's democratic purpose which was essentially expressing the will of 'the people' via representation. That mantra of its democratic and representative purpose survived in Dicey's concept. In reality, Government, Cabinet, Party and Whips dominated the parliamentary agenda.

In terms of its emphasis on representation, by loosening the grip of the aristocracy, essential nineteenth and early twentieth century reforms radically altered the franchise for the Commons – but not the Lords. In particular, the Reform Acts of 1832, 1867 and 1884 abolished the 40 shilling franchise and broadened the electorate to establish a uniform franchise throughout the country (UK Parliament, 2017; Norton, 2013, p. 20). The extension in terms of representation meant that changes in 1918 and 1928 enabled the female franchise to be brought into line with the standards for men (Norton, 2013, p. 22).

Like mass industrialization itself, parliamentary sovereignty acquired a 'cog in a machine' efficiency, acknowledged widely by the political and legal elite. The formula in the seventh constitutional form of 'What the Crown-in-Parliamentary Cabinet enacts is law' (1800-1972) in balance with its political conditions and constitutional conventions, naturally supports the neo-Diceyan view. Dicey and his contemporaries confirmed the

primacy of the Crown-in-Parliament formula, as the supremacy and ranking of the ultimate rule. The characterisation of its development can be described as serving the purposes of increasingly efficient government-in-parliament. It therefore had a heightened relevance along its previous eighteenth century path of reconciling popular and representative sovereignty to parliamentary sovereignty around a legal definition. The intervention of Cabinet-style Government, the reliance on party voting among the electorate, adopting the party line and ensuring votes in Parliament and the imposition of party discipline through the Whips system mediated the role of representatives. It thereby emphasised the executive's leadership of their making law through Parliament although technically, without external direction. Those constitutional changes presented Parliament as possessing a Bagehotian technical efficiency. Internally, parliamentary institutions were restructured, for example in 1911, and in line with the previous constitutional form of the nineteenth century, to give the Commons primacy and Lords subordination under the principle of asymmetrical bicameralism. Until the early years of the twentieth century, the House of Lords had the continued power to stop legislation. However, following a crisis in which the House of Lords refused to pass David Lloyd-George's 'people's budget' of 1909, the budget was then passed after a general election in 1910, followed again by a second general election on the reform of the Lords. The resulting Parliament Act 1911 removed from the Lords the power to veto a Bill, but permitted them to delay Bills for two years. A further Parliament Act of 1949 further reduced the Lords' delaying powers to one year. The political reality of the concept meant that it was at first dependent upon coherent and powerful parliamentary parties in the Commons to make policy, as initiators, without the Crown, to govern the country and choose the executive. That is a practice which seems to have predominated in law, the Cabinet and the Prime Minister's office throughout the eighth constitutional form of the twentieth century, including the passing of the European Communities Act 1972, Human Rights Act 1998 and the devolution legislation.

Constitutional form eight: 'What the Crown-through-Parliamentary political elite with external bodies enacts is law' (1973-present)

The meaning of parliamentary sovereignty in the late twentieth and twenty-first century's confronts specific historical challenges which have arisen, domestically and externally, within the recent context of post-war European political and economic development and against a historic backdrop of its inheritance. The principle that parliamentary elites rule

through Parliament transforms into the principle that Government rules through Parliament or partially through external agency or bodies. The ultimate rule is balanced against its political conditions supporting the rule. The ultimate rule that the Crown is embedded in and regulated by Parliament prevails but justified increasingly and paradoxically by the leadership of the Government through Parliament and partially through external bodies.

In 2017, the UK Parliament website states publicly of the principle of parliamentary sovereignty and its general definition:

“Parliamentary sovereignty is a principle of the UK constitution. It makes Parliament the supreme legal authority in the UK, which can create or end any law. Generally, the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change. Parliamentary sovereignty is the most important part of the UK constitution.” (UK Parliament, 2017)

They explain how it is “partly written and wholly uncoded.” The UK Parliament’s own account is notably frank on the issue of Parliament passing legislation which it describes as limiting the application of parliamentary sovereignty, including the devolved bodies (of the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly), the Human Rights Act 1998, the UK’s entry into the EU in 1972 and the decision to establish a UK Supreme Court in 2009. It carefully adds that those developments do not undermine the principle of parliamentary sovereignty on the basis that ‘in theory’, Parliament could repeal any of the legislation underpinning those changes (on repeal and disapplication of EU law, see European Scrutiny Committee, 2014; European Scrutiny Committee, 2013, p. 97; Tomkins, 2003; Lord Denning in *Macarthy’s Ltd. v Smith* [1980]).

Parliamentary sovereignty was conditioned by ongoing internal reforms guaranteeing the primacy of executive-led House of Commons, complete with a dominating Cabinet and Whips possessing greater primacy. The increasing professionalisation of representatives, albeit with greater independence (Norton, 2013, p. 27), the nineteenth century realities of Cabinet-style Government with the reliance on party voting inside and outside Parliament exerted ever-heightened leadership over Parliament, even during the substantial constitutional changes of the late twentieth century.

In terms of the Crown in Parliament, law and the political community, the concept of parliamentary sovereignty has been left with an entrenched quandary: an executive-led Parliament delegates its law making capacity in certain regards to other bodies / institutions who then impose external control, steerage and direction upon that law, so that

those representatives who are elected to the House of Commons by the political community to make law no longer have that practical capacity, since its everyday capacity or competency, but not ultimate right, was voluntarily ceded under the European Communities Act 1972. An elective, delegated Parliament is in a political sense a contradiction. Yet, as legal analysts, judges and lawyers have tended to oversee the ownership and terms of that debate, it has focused purely on the law and the European Communities Act, being only a voluntary Act, parliamentary sovereignty has remained pristinely untouched by EU membership. That conclusion seems both legally accurate but institutionally myopic.

Parliament retains its ultimate sovereignty because it has the power to terminate or change that membership by repealing or amending the European Communities Act 1972 (Tomkins, 2010) and yet the 44-year practice of choosing not to terminate or change substantial aspects of its Parliament-diminishing EU membership has been imagined to have left that doctrine intact. The crisis in the absence of politics itself is misinterpreted. The tension is in the restructuring of the state and in electoral representation to Parliament – the displaced political conditions and conventions which form the historical precedents. The legal definition of sovereignty is provided without a satisfactory account of politics and institutions, upon which parliamentary sovereignty depends.

Parliament has voluntarily established a higher set of European rules by which its legislation can be indirectly reviewed or overridden by higher law of a delegated body/agency. The neo-Diceyan definition which the UK has retained now possesses a meaning exhausted by previous constitutional struggles. The contemporary debate is not because of faults that lie at Dicey's door but it is to a great extent impoverished by the absence or non-engagement with the historical precedents discussed in those eight constitutional forms.

The making of the recognised helm: placing present hands on the wheel

Having reviewed those eight constitutional forms alongside the neo-Diceyan legacy, it is crucial to understand where the current assessment stands. For all its critics, Dicey's definition remains in contemporary legal and political usage 132 years later. It is strictly interpreted as the legal supremacy of statute, which means that there is no source of law

higher than or more authoritative than an Act of Parliament, even if it violates international law or changes a principle of judge-made, common law (Tomkins, 2010).

With the advent of significant constitutional changes, there has been a great deal of research which in one short phrase appears to throw out the constitutional baby, that is parliamentary sovereignty, with the political bathwater. There are various reasons given for doing so – namely on the role and interpretation of the European Communities Act 1972 (e.g. Norton, 2011), Human Rights Act 1998 (e.g. Feldman, 2011) and post-1998 devolution legislation (e.g. Tomkins, 2007). On Vernon Bogdanor’s argument, for example, the old British Constitution is expressed as Hart’s rule of recognition – ‘What the Crown in Parliament enacts is law’ (Bogdanor, 2009a, pp. 13, 73-4), with the author rejecting its relevance and role in the modern context. However, major political changes – now including the Human Rights Act 1998, the European Communities Act 1972 and significant devolution – have not simply meant an end to the ultimate rule in any previous constitutional form, and there is therefore no reason why it should be the case in the eighth form.

Both Vernon Bogdanor (2009a) and Anthony King (2007) make a substantive leap from their understanding of a heavily delegated, mixed political and parliamentary structure – King’s constitutional ‘mess’ and Bogdanor’s mixed, quasi-federal constitution, both of which cite the development of the EU – to concluding, as King maintains, that there is a new British constitution under which “the British parliament is no longer sovereign” (King, 2007, p. 99). The contradiction in brief and in my view in the final constitutional form is that the ultimate rule is preserved in theory, and yet the executive-led Parliament makes law in practice with external steerage and direction, with one major example being EU, which is not itself the creation of an Act of Parliament. Representatives are elected by the political community to Parliament to make law in an executive-led assembly that has voluntarily ceded, by legislation, to delegate that law-making capacity to the EU among other bodies.

Overall, it is briefly summarised below in Box 3.1, how those series of eight constitutional forms describing prominent historical features help to frame multiple constitutional forms of the rule providing for parliamentary sovereignty. Each of those constitutional forms illustrate the different meanings attributed to the rule of the recognised helm, from its inception to its contemporary context, in a partly episodic, partly tangential but partly continuous approach. Only eight substantive events triggered an alteration of the fundamental rule to produce a new constitutional form: (i) the codification

of the Crown seeking counsel from magnates; (ii) a petitionable Crown seeking approval from the House of Commons; (iii) the initiation of the Reformation; (iv) the overstatements of divine monarchical power and of common law rights relative to the legislature in the Early Stuart period, then Restoration period; (v) the revolution and settlement of 1688/89; (vi) the settlement of a mixed power checks power constitution; (vii) the vast extension of franchise (under the Reform Acts) with an efficient Cabinet-led Commons, and; (viii) the vast extension of agencies and bodies, namely the EU, in providing government.

Box 3.1: The continuity and the change in the constitutional forms defining parliamentary sovereignty

Constitutional form one ‘What the Crown-*with*-magnates enacts is law’ (1200-1350)

- Thirteenth and fourteenth centuries constitutional form of sovereignty defined by Crown with magnates.
- Sovereignty exercised by Crown as divine power, increasingly subject to fundamental law, moral duty and baronial counsel.
- The Crown rules by consulting counsel of magnates.
- The helm of the ship of state governed by Crown advised by counsel.
- Perceived claim to representation necessary for taxation for Crown revenues.
- Sovereignty overtly political, not legal, albeit increasing codification of means through which Crown should seek counsel.
- Crown’s power to govern is mutually conditioned by fundamental law/rights understood as moral duty.

Constitutional form two **‘What the Crown-*with*-Commons enacts is law’ (1350-1532)**

- Late fourteenth century to the Reformation constitutional form of sovereignty defined by Crown with the Commons.
- The Crown rules with Commons but increasingly bound, not only advised by, the Commons activity.
- Widening representation through use of petitions, county- and town-representing, and impeachment of officers for 40 shilling freeholders
- Equalising of power at helm of state with capacity to pass law i.e. *dominium politicum et regale*.
- Parliamentary validation of title to the throne
- Crown’s power to govern continues to be mutually conditioned by fundamental law/rights understood as moral duty.
- Electorate of men with freehold estate of 40 shillings or more from shires.

Constitutional form three **‘What the Crown-*through*-Parliament enacts is law’ (1533-1602)**

- Sovereignty defined after the Reformation is increasingly derived from Crown through Parliament (Parliamentarian theory), not simply Crown with Parliament (Royalist).
- Assumption made of legislative sovereignty after 1539/40.
- Reformation Parliament said to gain omnicompetence e.g. *jus regale politicum*, in which no area involved in the government of the realm is outside of its authority, but royal despotic power exercised.

- Crown did require consent for lawful taxation and legislation.
- Crown, Lords and Commons exist within a mixed powers constitution.
- Crown's power to govern is mutually conditioned by fundamental law/rights understood as moral duty.
- Assumption made of parliamentary representation of the political community as the consent of every man. Electorate of men with freehold estate of 40 shillings or more from shires.

Constitutional form four 'What the Crown-*with*-disputed Parliament enacts is law' (1603-1687)

- Sovereignty defined in the early Stuart period and the Restoration is less derived from Crown-through-Parliament, increasingly by Crown-with-Parliament.
- The Parliament rules with Crown but disputed foundations of Crown, ancient common law or consenting community.
- Distinct emphasis, however erroneous, on common law constitution as foundation of sovereignty.
- Crown's power to govern is bound, it is claimed, by the assertion of an ancient common law/rights, now understood as legal (not moral) duty.
- With no consensus, the monarchy was finally restored and with the assumption of legislative authority of the monarch with Parliament.
- Continued assumption made of parliamentary representation of the political community.
- Electorate of men with freehold estate of 40 shillings or more from shires.

Constitutional form five **‘What the monarch-*in*-regulating Parliament enacts is law’ (1688-1689)**

- Theorised before the revolutionary events of 1688/9.
- Sovereignty established in the form of a parliamentary monarchy.
- Crown brought under the powers of the omnipotent legislature.
- Courts thereby denied the power to limit Parliament’s sovereignty.
- Crown power to govern continues to be mutually conditioned by fundamental law/rights understood however as moral duty, not as a legal duty. The claimed supremacy of an ancient common law constitution is limited by the settled supremacy of Parliament.
- Representative claim to gaining consent through consensual, elective, representation and majoritarian Parliament develops its own independence.
- Broad political sovereignty tied to a tighter definition of legal sovereignty.
- Electorate of men with freehold estate of 40 shillings or more from shires.

Constitutional form six **‘What the Crown-*in*-mixed constitutional Parliament enacts is law’ (1690-1790s)**

- The eighteenth-century formulation of sovereignty bolstered by a mixed, balanced constitution.
- Parliamentary oligarchy has uncontrollable, despotic sovereign power combined with commitment to limited government.
- Balanced and mixed, ‘power checks power’ constitution of the

monarchical (monarch), aristocratic (Lords) and democratic (Commons representing people) powers.

- Tories concede legislative sovereignty belongs to Crown in Parliament.
- Whigs concede people cannot be trusted beyond a limited political role.
- The power to govern continues to be mutually conditioned by fundamental law/rights understood however as moral duty, not as a legal duty. The claimed supremacy of an ancient common law constitution figures heavily in dialogue but is closed off in practice by the supremacy of Parliament.
- Reform movements to undermine parliamentary sovereignty discredited by activities of the French Revolution.
- Electorate of men with freehold estate of 40 shillings or more from shires.

Constitutional form seven **‘What the monarch-*in*-Parliamentary Cabinet enacts is law’ (1800-1972)**

- The nineteenth century formulation of sovereignty as largely exercised by the Crown and parliamentary political elite.
- The aristocratic elite rule through an increasingly more representative Parliament.
- Capacity of Parliament to make law without external direction upon nation.
- Fusion of ministerial Cabinet powers at the heart of the Commons – the Commons having primacy over the Lords, and no preoccupation with the balanced or mixed constitution.
- Stable and efficient government, requiring popular assent and

fresh elections.

- Altering of the franchise, significantly and incrementally broadening the electorate and ending of the 40 shilling freeholder.
- Almost solely defined through law, less through politics.
- Cabinet government's efficient power to govern provides no settled link between sovereign power as being mutually conditioned by the rule of law and fundamental law/rights. The serious claim to the supremacy of an ancient common law constitution does not prevail.

**Constitutional
form eight**

'What the monarch-*through*-Parliamentary political elite with external bodies enacts is law' (1973-present)

- The twentieth and twenty-first century formulation of sovereignty exercised by Government through the political elites in Parliament and with external bodies, particularly the EU.
- Increased strength for Government ruling through Parliament and when applicable, external agency and bodies.
- A political elite of ministers elected by a full franchise of the people governs through an asymmetrical, bicameral elected Parliament in which the Commons decides and the Lords advises.
- The EU, the devolved bodies, the Supreme Court and the Human Rights Act can each claim to enhance executive and judicial institutions but limit the application of parliamentary sovereignty.
- Practical primacy accorded to executive leadership in House of Commons through the increased power of Cabinet and Whips.
- Government's power to dominate prevails but now mutually

conditioned by fundamental law/rights and under certain legislation, even bound as a legal duty. The claimed supremacy of the rule of law and a common law constitution features heavily in dialogue although is largely closed off in practice by the supremacy of Parliament.

The ultimate rule credits the actors in the recognised helm. The nature of being ‘at the helm’ is the description of the leading, traditional, composite parts of the state. Throughout the constitutional forms, there is a Crown, whose prerogative powers are today conducted through the powers of the ministers in the executive. They each inherit various descriptions throughout different constitutional forms. It is a recognised helm because there is an acceptance or consent for those participating actors to fulfil a given purpose within their constitutional boundaries. In the first medieval constitutional form, the Crown and magnates are at the helm, constrained only marginally at the helm by codified, fundamental law (e.g. the Magna Carta). In the late fourteenth century to the Reformation of the second form, the Crown and the Commons are at the helm, constrained and conditioned only partially at the helm by fundamental law and in some limited manner by concerns of the 40 shilling freeholder constituents and county- and town-representing. The third constitutional form of sovereignty after the Reformation, defers strongly to the Crown and Parliament at the helm to govern in every area of the realm (e.g. over Church) but particularly for lawful taxation and legislation. The constraining actors at the helm, again, could only be understood in terms of fundamental law and the concerns of the 40 shilling freeholder constituents. The fourth form defines the Crown and Parliament at the helm but more strongly – potentially, legally – constrained by the judges and the perceived ancient common law constitution, and the binding claims of the consenting community as foundational to sovereignty and in some cases, with the claim of the Crown reigning supreme over Parliament. The fifth form emphasises the settlement between the Crown, the Parliament directly linked as representative of the people and in particular, through the political parties. The claims of the judicial element over the common law are importantly recognised but regulated, unable to exceed the limits of Parliament’s claim to sovereignty. The sixth form identifies the Crown (Royal), Commons (democratic), Lords (aristocratic) and the judiciary as actors participating and checking within a balanced constitution (Kors, 2012; Jenkins, 2011; Gagarin, 2010; Lieberman, 2006; Bellamy, 1996, p. 441; Blythe,

1992, p. 12). The seventh form of sovereignty recognises the Crown and the parliamentary, aristocratic, political elite of the Cabinet in government as the main powers at the helm, increasingly conditioned and constrained by the electorate through major changes to the franchise under the Reform Acts, but no realistic limitation by common law claims. The eighth constitutional form adopts the Crown powers and the parliamentary political elite of ministers at the centre of the recognised helm – with only more recent claims by the EU, the devolved bodies, the Supreme Court and the Human Rights Act seeking to enhance executive and judicial institutions but which can limit the objectives of the Crown powers exercised by the ministerial executive and assented to by the parliamentary elite. The ministerial power to dominate Parliament's agenda prevails but it is bound by fundamental law/rights doctrines under certain legislation (e.g. namely, the Human Rights Act and the European Communities Act), even to the point it is obliged as a legal duty to follow or consider that legislation where inconsistent with its own national legislation.

The recognised helm is therefore the acknowledged and recognised legal and political space defining what is permitted to steer, direct and control new or novel *inter-relationships*. It is the helm of state which has permitted the incorporation of new inter-relationships, for example, between the Crown and the magnates of the realm; between Papal interference and the Crown, the Church and the community; between the EU and the executive, the legislature, the judiciary and the electorate; between the Magna Carta's listed rights and the Crown, the magnates and the people. In each case, competing historical claims often insist that sovereignty in or involving Parliament has been lost, qualified, eroded, altered or destroyed, with others claiming it is preserved or enhanced. However, with the proposition of a recognised helm, there is a more reflexive model. It is less prescriptive. It does rely on the acknowledgement, or recognition, of participating actors within the constitution.

The first constitutional form of 'What the Crown-with-magnates enacts is law' (1200-1350) is a Crown whose sovereignty only makes sense with reference to this inter-relationship with the counsel of magnates. The exercise of sovereignty is increasingly and formally politically bound by a counsel of magnates but more loosely and morally bound by fundamental law. The second form of 'What the Crown-with-Commons enacts is law' (1350-1532) is a form of sovereignty defined by the petitionable Crown with the Commons. The exercise of sovereignty is increasingly bound, not only advised by, the Commons activity through use of petitions and county- and town-representing and yet only minimally, mutually conditioned by morally binding fundamental law. The third form of

‘What the Crown-through-Parliament enacts is law’ (1533-1602) is sovereignty derived from a Crown *through* Parliament, not simply a Crown *with* Parliament. The exercise of sovereignty depended upon a Parliament in which no area involved in the government of the realm was outside of its authority, but Royal despotic power continued to be exercised, since it remained only minimally and mutually conditioned by morally binding fundamental law. The fourth form ‘What the Crown-with-disputed Parliament enacts is law’ (1603-1687) moves towards a sovereignty formula in which it is less derived from Crown-through-Parliament, increasingly by Crown-with-Parliament. Parliament is devalued. The exercise of sovereignty is increasingly bound, it is claimed, by the judges’ prominent assertion of a mythical ancient common law/rights but now comprehended as legal (not moral) duty. In the fifth constitutional form, ‘What the Crown-in-regulating Parliament enacts is law’ (1688-1689), in which the Crown is brought under the powers of a regulating, sovereign omnipotent legislature. The courts were thereby denied the power to limit Parliament’s sovereignty. The claims to the binding nature of supremacy of an ancient common law constitution is now limited by the settled supremacy of Parliament. In the sixth form, ‘What the Crown-*in*-mixed constitutional Parliament enacts is law’ (1690-1790s), is an inherited sovereignty of a supreme Parliament bolstered by a mixed, balanced constitution of the monarchical (monarch), aristocratic (Lords) and democratic (Commons representing people) powers. The parliamentary oligarchy has uncontrollable power balanced with the Crown and the judges and checked by a much-discussed supremacy of an ancient common law constitution which is closed off in practice. In the seventh form, ‘What the Crown-in-Parliamentary Cabinet enacts is law’ (1800-1972), sovereignty is mostly legislative, largely exercised by the Crown and parliamentary political elite through the Cabinet, bound increasingly by the broadening franchise. The efficient ministerial powers to govern provided no settled link or bind on the sovereign power whatsoever by the rule of law of the courts. The eighth constitutional form, ‘What the Crown-through-Parliamentary political elite with external bodies enacts is law’ (1973-present) considers sovereignty exercised by political elites in Parliament and through external bodies bound increasingly by the EU, the devolved bodies, the Supreme Court and the Human Rights Act which can limit the practical exercise of parliamentary sovereignty. The mutually conditioning of sovereignty by fundamental law and rights can under certain legislation now be constrained by a legal duty to comply with.

The recognised helm carries with it a substantive implication about the nature of power sharing and of sovereignty. It assumes that there are recognised actors and a recognised set of inter-relationships, as discussed above. When those actors and

relationships between the executive, the legislature, the judiciary and the electorate are recognised, there is an assumption of jointly, and however competitively, bolstering sovereignty at the helm. They wield substantive power in the state and parts of their roles and functions are shared. Therefore, it is not necessary to assume that all the constraints of fundamental rights charters or of popular power upon sovereignty should be understood merely as limitations. Both in the case of fundamental rights and expressions of popular power, they can be properly understood as bolstering parliamentary sovereignty. Equally, the full exercise of executive power, under the full consent of Parliament, bolsters not limits parliament's sovereignty. Therefore, not all power-sharing at the helm ought to be understood as somehow a limitation. Where limitations upon parliamentary sovereignty are enacted or created, it can often be understood through the altering of, or introduction of, new actors and their inter-relationships at the helm to point that they transgress the precedented relationships as understood through previous constitutional forms. The significance of power-sharing need not be overstated because, as has already been described, actors at the recognised helm can steer and direct other central actors i.e. namely the Government acting through Parliament. Steering and directing power does not necessarily equal sharing of power. It is mainly the executive, the legislature, the judiciary and the electorate who have a hand at the wheel of the ship of state, sometimes having their power strengthened while at other points weakening their power in comparison to other state powers.

In the case of the EU, limitations upon parliamentary sovereignty are created through the altering and introduction of new EU institutional actors and their inter-relationships with the EU and national courts, the legislature and member state governments and the people. The alteration has been created at the point that the constitutional 'unsettling' transgresses the precedented relationships as understood through previous constitutional forms. The EU contributes, with its competitive hand on the helm, to steering and directing the Government and Parliament, giving it a greater role in navigating state policies. At the recognised helm, successive governments, through Parliaments, have adopted practices which whilst preserving the fundamental rule, are at odds with past historical precedents. This process has led to an altering of the relationships between the executive, the legislature, the judiciary and the electorate with the EU machinery of government, unsettling those historical precedents of parliamentary sovereignty.

When there is friction or conflict between past constitutional forms of the UK constitution, it is possible to consider the friction or unbalancing of past constitutional conventions as ‘unsettling’. In particular, when a modern constitutional form of the constitutional understanding in the eighth stage is in conflict with the previous seven historical constitutional forms, an ‘unsettling’ occurs which centres on:

- A shift from one constitutional form to a newer or different one, particularly a past historical form and the contemporary eighth constitutional form.
- The experience of unsettling focuses on the experience in the disturbing of historically preceded inter-relationships between the executive, the legislature, the judiciary and the electorate.
- A shift away from or toward a qualitatively and uniquely different constitutional form in which one of the defining features (e.g. bringing the executive under a more formal accountability to the legislature or bringing the legislative under a uniquely new form of accountability to its electorate) has been altered or swept away.
- When there is a shift in one major feature of a constitutional form, it necessitates an impact on all or most other powers in the constitution e.g. the Reformation and the creation of an omniscient Parliament or the incorporation of the EU in 1973.
- The most substantive form of ‘unsettling’ derives from a change in the fundamental rule which underpins the contemporary constitutional form of parliamentary sovereignty, for example, after the Reformation, and the events of 1688.

The less substantive form of unsettling, including changes induced by the European Communities Act 1972 and its subsequent amendments and post-1997 constitutional reforms, derive from the change in some of the features from previous historical constitutional forms. The eighth constitutional form deviates strongly from past historical forms, particularly through its emphasis on fundamental rights charters adjudicated upon by courts in Luxembourg and Strasbourg, the independence and elevation of the national judiciary in respect of the legislature and executive, and a body of government derived from EU institutions.

If there is to be an ultimate rule of the recognised helm which must provide the conditions another rule must satisfy in order for that rule to impose obligations as valid law and settlement, the requisite historical conditions of the social rule must be given. The

composite parts of parliamentary sovereignty which have been provided for in the eight historical constitutional forms have provided the rule with its criteria. The helm can be defined, in Bracton's view, by sovereignty at the helm of the medieval state being bound to moral duty but ultimately, the law and the law-making sovereign remaining "mutually conditioned", reciprocal and interdependent at the helm, even though the sovereign power retains the power to govern the realm (Kantorowicz, 1957, pp. 153, 155). Each defining moment of parliamentary sovereignty's historical meaning have a share in the criteria provided by the ultimate rule. It is not maintained that conditions have an equal share because historical events and the flexible relevance that precedents have to contemporary politics, as balanced within the unique historical forms, determine the relevance of, for example, omnicompetence or fundamental rights provision to the current meaning of parliamentary sovereignty. The conceptualisations of parliamentary sovereignty as described within the eight historical constitutional forms find their expression, however latent or however pronounced, in that ultimate rule. Without them, the rule of the recognised helm is an internal vacuum, an apolitical, legal abstraction and not 'ultimate' in any sense. The rule of the recognised helm attempts to respond to both the requirements of legal positivists in insisting upon rules which provide valid law (e.g. Hart, 1997) and also to constructivist and poststructuralist assumptions of sovereignty as historically contingent upon political conditions.

The conditions of the ultimate rule provide for historically precedented constitutional forms of the constitution by explaining the relationship between institutions, rules and customs. By precedent, it is meant that the fingertips of past, historical precedents are pressed into the old, dry sponge of UK constitutional history by past political customs and constitutional conventions, to be compressed, reshaped and reconfigured in reflecting those precedents. On the interaction between rules and precedented historical customs, even though classical liberal thought, particularly in the approach of John Locke, conceived of custom in the negative – as inhibiting individual reason – his view on liberal culture was one where customs were reasonable, meaning that they support the authority of reasonable rules and that there are good reasons for them (Grant, 2012, p. 621). Hart himself, however, rejected habitual obedience or accustomed belief in the sovereign in the view of political theorists such as Austin and Hobbes, or custom, or obedience, or habit, etc, as the basis for laws as social rules. However, on the basis that Hart assumes laws are rules and therefore social, his fuller theory was not as parsimonious as first might seem: some place must be given to custom and political precedent otherwise there is really no such thing as Hart's own proposition of laws as

social rules. In terms of custom, Edmund Burke, for example, critiqued the brutality of the French revolutionaries' determination to transform political life by their having removed historical tradition and constitutional custom (Berkowitz, 2013, p. 52) – custom thereby embodied the nation's inherited and accumulated wisdom relating to their organisation and institutions (see also, Pocock, 1987, p. 242). For Burke, sovereignty and the business of governing were a matter of convention, customised by inheritance, prescription and simple necessity (Radasanu, 2011, p. 18). Locke and Burke are rarely mentioned together in the orthodoxy of political theory, but they do help us in this context because historical constitutional forms which we employ to characterise features of sovereignty and parliamentary sovereignty are not simply accrued or aggregated – they thrive, survive, part-survive or completely decay or die, but nonetheless they all provide precedent and convention. They are the conditions of the ultimate rule of recognised helm contained within Locke's liberal culture in which customs are reasonable, and they support the authority of reasonable legal rules and that there are good reasons for them. While such a view is not as custom-based as Burke suggested the constitution was – because he did not accept that sovereignty, law and the business of governing are rule-based – nevertheless those rules and the ultimate rule are themselves buttressed by historical precedent, as conventions and customs upheld, for example, by inheritance.

In understanding the rule of the recognised helm, historical understandings contained within the eight constitutional forms are pertinent because:

- Constitutional forms, as historical conditions, give the rule existence.
- Parliamentary sovereignty as an ultimate rule of the recognised helm acts as a workable rule because it provides those conditions any other rule must satisfy in order for the rule to impose obligations as valid law and political settlement.
- Social conditions and customs are crucial, but by no means causal or restrictive, to the rule.
- Parliament is sovereign not because it is a principle to be weighed against others via judicial interpretation but because it is an institutionalised rule of the recognised helm dependent upon the customs, conventions and politics of past historical precedents.

The following chapter (Chapter 4) will set out that Parliament, since 1973, has become practically less sovereign because the fusion of the executive with EU machinery, the dilution of the domestic legislature and the fusion of the judiciary with the Luxembourg

court system, impacts upon and unsettles a past constitutional form of parliamentary sovereignty. That explanation of parliamentary sovereignty impacts upon the sixth of the eight historical constitutional forms, reflected in the views of Blackstone (1765), Burke (1774) and Montesquieu (1748) in the eighteenth century, in which the status of the ultimate rule in the sixth historical constitutional form of ‘What the Crown-*in-mixed* constitutional Parliament enacts is law’ required balance against its political custom of the balanced, mixed constitution to support the rule. The contemporary, changing relationships between the executive, the legislature, the judiciary and the electorate have altered remarkably because of the interaction with the EU. A consideration of the case study of the EU-level Financial Transaction Tax (FTT) provides some evidence that the UK’s recognised helm has, through this unsettling of the historical precedent mixed constitution model, impacted upon parliamentary sovereignty. Chapter 5 then goes on to argue that Parliament has become practically less sovereign because of the distorting of the European Parliament to collectively represent its electors. The case study of the Working Time Directive illustrates that the recognised helm has had European Parliament-level functional representation competing with the Westminster Parliament to produce an unsettling of the historically precedent capacity to collectively represent its electors as strongly embedded within precedent political historical constitutional forms. It thereby unsettles the political strength of parliamentary sovereignty. Chapter 6 proceeds to describe a Parliament that is effectively less sovereign in part because the recognised helm has had EU-level fundamental rights schemes, protected by the courts, incorporated into it. The case study of the free movement right has illustrated the dilution of the domestic legislature as a rights-providing institution, which combined with the disappearing consensus between the arms of state and community in providing rights, has progressed a continued legislative decline and judicial advance in the UK, impacting indirectly upon the stabilisation of parliamentary sovereignty. Chapter 7 then argues that Parliament becomes practically less sovereign when the recognised helm has had EU-level decision-making incorporated into it, directly reducing parliamentary ultimate decision-making power over political decisions as exercised by the Government-in-Parliament on behalf of its electors. David Cameron’s Prime Ministerial-led renegotiation ahead of the EU Referendum provided significant evidence of the executive-legislative gap under EU membership; yet, since the EU Referendum of June 2016, Parliament’s ultimate power to decide on the UK’s EU relationship permits the executive to pursue a constitutional resettlement, if it so chooses, addressing the historical dilution of parliamentary powers. That step signifies the realignment of Parliament with a historically precedent basis in which the operation of

Parliament's ultimate decision-making power over political decisions was maintained by the Government-in-Parliament on behalf of its electors.

Chapter 4: Parliamentary sovereignty, the precedent of the mixed constitutional model and the UK's membership of the EU

Parliament remains *theoretically* sovereign in part because the ultimate rule of parliamentary sovereignty rests on the precedential and structural basis of the mixed constitution in which the executive, the legislature and the judiciary are intermeshed as functionally separate but practically inter-related. Yet Parliament is *practically* less sovereign because, since 1973, the UK's governing helm has had the EU institutions incorporated into its government through a fusion of the executive with EU machinery, the dilution of the domestic legislature and the fusion of the judiciary with the Luxembourg court system, which impacts upon and unsettles the political strength of parliamentary sovereignty. That explanation of parliamentary sovereignty impacts upon the sixth of the eight historical constitutional forms, illustrating the meaning of the mixed constitution attributed to parliamentary sovereignty.

Parliamentary sovereignty during the eighteenth century, stated as 'What the Crown-*in-mixed* constitutional Parliament enacts is law' (1690-1790s), reflected the 1688/89 settlement, the 1707 Union and the rivalling of popular sovereignty with Parliament's sovereignty. The ultimate rule in the sixth historical constitutional form requires balance against its political custom of the mixed constitution to support the rule. It is the sixth episodic moment within a historically discontinuous approach of eight potential historical constitutional forms describing parliamentary sovereignty. It is a balanced constitution which depends upon government through the mixed monarchical (monarch), aristocratic (Lords) and democratic (Commons representing people) powers, broadly in the interests of a parliamentary oligarchy. This historically precedented constitutional form responds to Bogdanor's (2009a) claim that constitutions have the objective of 'providing organisation' (Bogdanor, 2009a, pp. 53-54), and to that extent the historical forms of the mixed constitutional model specifies the organisational and relational features of the British 'constitution'.

For modern purposes, as the contemporary classical guide to parliamentary practice and procedure, *Erskine May*, prefaced by the former Clerk of the House of Commons, Sir Malcolm Jack, states "The flexibilities inherent in the United Kingdom's constitutional arrangements mean that the relationships between the principal elements, the Crown, the legislature, the executive and the judiciary, are not immutable, but even so the rate and extent of change, particularly in respect of the relationships between the legislature and the

executive and the legislature and the judiciary ... has been remarkable. Some of that change—for example law emanating from the European Union — occurs outside but greatly influences the workings of Parliament.” (Jack et al., 2011, p. viii). In other words, the contemporary, changing relationships between the executive, the legislature and the judiciary have been remarkable because of the interaction with the EU. It unsettles the political precedents of parliamentary sovereignty. Parliament is practically less sovereign because EU membership has unsettled prior historical constitutional forms in which the powers of the executive, the legislature and the judiciary must now be joined by the EU in impelling the machinery of government in a direction different from which either acting by itself would previously have done.

It is not unusual to refer to, or imply, that the contemporary British constitution is a mixed constitution. Tomkins (2013) proposes that the contemporary British constitution is indeed now a “mixed constitution”, but does not employ the term with any use of historical precedent but in the sense of referring to the contemporary mix of politics and law (Tomkins, 2013, p. 2275). The mixed constitution possesses elements of both a political constitution and a legal constitution in explaining how the modern executive is held to account; and the distinction between the legal and political can often been a false choice. Yet, in doing so, it resists references to the mix of monarchy, aristocracy, and democracy that eighteenth century legal and political scholars had described. He adds that the concept does not take us very far. In his view, “It matters less that the constitution is mixed than what the balance of the mix is, and should be.” (Tomkins, 2013, p. 2276). However, it matters both that the constitution is mixed and what the balance of the mix is, because that is precisely how EU membership has affected the underlying political custom of the mixed constitution, underpinning parliamentary sovereignty. Constitutional theorists such as Turpin and Tomkins (2011) overlook the relevance of the separation of powers doctrine in relation to buttressing contemporary parliamentary government and sovereignty but that is partly due to their focus being limited to an analysis of parliamentary government after the Reform Act of 1832 as not being based on separation of powers doctrine (Turpin and Tomkins, 2011, p. 129).

Parliamentary sovereignty and the historical mixed constitution

The mixed constitution has an inherent place in the historical development of the British constitution. The most preeminent authority on parliamentary sovereignty during the

eighteenth century is Blackstone, who in 1765, wrote of Parliament that it has sovereign and uncontrollable authority, an absolute despotic power entrusted by the constitution and was able to do anything unless of course it was naturally impossible (Lubert, 2010; Goldsworthy, 1999, p. 202; Blackstone, 1765). Blackstone characterises such sovereign power as located within a tripartite, neo-Montesquieuan mixed constitution (Lieberman, 2006, pp. 318, 335; Montesquieu, 1748), although Lieberman questionably rejects parliamentary sovereignty as impermissible in that constitution. For Blackstone, England historically enjoyed a mixed constitution founded on the Crown, Lords and Commons – as “distinct powers” which jointly impel the machinery of government in a direction different from what either one acting by itself would have done and thereby in a direction formed from each part (Blackstone, 1765). Close to Blackstone, Montesquieu’s view of the English ‘power checks power’ constitution (Bellamy, 1996, pp. 443-4) is one in which the executive and the two branches of the legislative act as checks on one another yet the judicial power and tribunals of law are subordinate to the legislation (Lubert, 2010; Goldsworthy, 1999; Montesquieu, 1748). The sovereignty of Parliament for Edmund Burke, is located within a balanced constitution configured around a trust between the Crown and Parliament’s chambers (Craig, 2012, pp. 106-8).

Blackstone, Burke and many other leading political figures in eighteenth century England described the British constitution as being a well-balanced combination of different forms of government – monarchical, aristocratic and democratic – each balancing out the other (Lieberman, 2006, p. 318; Blackstone, 1765, pp. i, 50-2). The constitution generally reflected a ramshackle system held together by a poorly integrated composite state (O’Gorman, 2012). Nevertheless, judicial review was in this context not considered necessary for a system in which the Commons claimed to represent the electorate and the Crown and the Lords checked that relationship (Goldsworthy, 1999) and essentially decided what the law was which was then enforced by the courts. The organising principle for the English eighteenth-century constitution was that it could preserve political freedom by effectively preventing arbitrary or tyrannical acts of power (Lieberman, 2006, p. 317). The ultimate rule in the sixth historical constitutional form of ‘What the Crown-*in*-mixed constitutional Parliament enacts is law’ requires balance against its political convention of the mixed constitution to support the rule.

Although Dicey in the nineteenth century accepted principles and rules as “the conventions of the Constitution” which regulate relationships (Russell, 1987, p. 545), he subverted those conventions of Blackstone (1765), Burke and Montesquieu (1748) in

theory as non-legal, additions to the constitution, rather than having political primacy. The Diceyan approach provided no direct credit to the mixed constitution as a political custom (Francis and Morrow, 1994, p. 10) in understanding parliamentary sovereignty in the seventh and eighth historical constitutional forms. In the sixth historical constitutional form examining the eighteenth-century constitution (Chapter 3), however, the ultimate rule conferred supremacy upon the unlimited and absolute power of Parliament. The rule is constructed by political conventions, including a Tory-Whig consensus with the Crown-in-Parliament, but limited role of the people, exercised within the mixed constitution of the executive, legislature and the judiciary.

Government at the helm of state – involving the mixed constitution of the executive, the legislature and the judiciary – has since 1973 experienced the addition of EU institutions incorporated into its structure. Since the sovereign Parliament within the UK state structure has so often been lodged within the mixed powers, it is useful to examine their conceptual relevance to illuminate the EU's institutional impact on the UK's rule of the recognised helm. The conceptualisation of parliamentary sovereignty as emanating from the mixed constitution of Blackstone (1765), Montesquieu and Burke (Craig, 2012; Bourke, 1999) in the sixth historical constitutional form finds its expression, however latent or however pronounced, in that ultimate rule. That construction of the ultimate rule provides for constitutional custom and legal and political precedent. Parliamentary sovereignty is an ultimate rule of the recognised helm because, as a rule, it provides those political conditions (e.g. the mixed constitution) any other rule must satisfy in order for the rule to impose obligations as valid law confirming political settlement. The rule works because the executive initiates law and policy, the legislature accepts or rejects them, and the judiciary applies the law of that executive, assented to by the legislature, without substantial, external interference. The conditions are therefore crucial, but by no means causal or restrictive, to the rule because of the flexibility inherent to past, political precedent. A mixed constitution which places limits on government does not necessarily challenge the sovereignty of Parliament. Blackstone's (1765) notion that the mix of Commons, Lords and Crown would jointly impel the machinery of government was derived from the notion that Parliament as a whole had sovereignty authority. Given the ultimate rule of parliamentary sovereignty must provide the conditions another rule must satisfy in order for that rule to impose obligations as valid law and political settlement, the requisite conditions of the rule must be properly described, namely the role of the EU institutions as it impresses upon the organised, historical precedent of the mixed constitutional model.

Parliamentary sovereignty and the contemporary mixed constitution

It is imperative to recognise the contemporary relationship between parliamentary sovereignty and the mixed constitutional model – particularly in contrast to ideal types underlying features of either a republican state or a constitutional state which undermine that connection and never wholly explain parliamentary sovereignty or its relationship to the mixed constitution, as impacted upon by EU membership. Bogdanor (2009a) in his central argument in *The New British Constitution*, argues that the post-2007 era of constitutional reform, together with Britain's entry in 1973 into the European Communities has had the effect of replacing one constitution – that is the Diceyan doctrine of parliamentary sovereignty and Bagehot's proposed fusion of the legislative and executive powers – with a new constitution. The main elements of the new constitution include: post-European Communities Act arrangements, the Human Rights Act, the cornerstone of the new constitution; the devolution legislation, which has turned Britain from a unitary into a quasi-federal state; reform of the House of Lords, radically altering the role of the upper House; and the employment of referendums to validate constitutional reforms. He suggests those reforms strengthened the likelihood of Britain adopting a written or codified constitution and the potentiality for a popular constitutional state (Bogdanor, 2009a, pp. i-xiii). However, the emergence of a popular constitutional state, based on those features, is not evident. The old constitution, he theorises, was based on the sovereignty of Parliament; the new constitution is based on a constitutional state with an enhanced separation of powers (Bogdanor, 2009a, p. 285). Bogdanor (2009a), in describing the complex mix of the new constitution, recognises it but views the rule of law as superseding Hart's rule along with other more novel features and reforms at the forefront of the constitution. However, it has never been a zero-sum game as Bogdanor assumes: the UK has both parliamentary sovereignty and a pragmatically organised, partial separation of powers (on the latter, see Masterman, 2011) which ultimately have a directing capacity at the helm. Bogdanor's theory is antithetical to recognising the contemporary connection between parliamentary sovereignty and the separation of powers, as the tripartite basis of mixed government.

The traditional mixed constitution of the executive, the legislature and the judiciary is practically inter-related in the sense that under the Westminster model, ministers in government leading their departmental bill teams (including legal advisers) and policy

officials of the executive are at the recognised helm by proposing and drafting conventional Government bills, which in turn require consent of the House of Commons and application by the judiciary. As a 'reactive' legislature, the House of Commons is the means for a Government's dominant, partisan parliamentary majority to support, amend or reject the executive's legislation and their wider governing objectives, but not propose alternatives on their own (Norton, 1984; Norton, 1994; Mezey, 1979). The 1689 Bill of Rights established for the House of Commons a sole right to authorize taxation and the level of financial supply to the Crown. The Westminster model assumes the Prime Minister and members of the Cabinet are mostly drawn from the Commons (especially the more senior members), mostly from within a dominant Government, built upon a partisan Commons majority. In practice, a Government, with a strong majority, rules through Parliament (which has led many to view parliamentary sovereignty itself as only a vehicle for the will of the Government). The House of Lords has limited powers in the form of a legitimising and scrutinising body for proposing revisions to the Commons. The heightened democratic basis of the House of Commons secures its primacy over the House of Lords and the Crown within Parliament. The judiciary are then required to give effect to the statutes of Parliament or interpret their meaning where complexity and uncertainty arises as to how the law applies in a given situation. The judiciary is the branch of government responsible for interpreting the law and for resolving legal disputes, albeit under the Human Rights Act 1998, courts are able to make decisions through interpretation of legislation in a way which preserves European Convention rights (Bradley, 2011, p. 64; Bradley and Ewing, 2010, pp. 401-7). Those functionally separate institutions of the executive, the legislature and the judiciary are practically interrelated by procedures and flexible relationships which underpin the rule of parliamentary sovereignty.

The contemporary recognised helm has historically experienced the incorporation of EU institutions into that helm through a fusion of the executive with EU machinery, the dilution of the domestic legislature and the fusion of the judiciary within the Luxembourg (and Strasbourg) court system, which impacts upon parliamentary sovereignty. As such, EU obligations dilute and unsettle Blackstone's (1765) understanding of the mixed constitution, existing as historical precedent: the Crown and legislature are now joined by the EU at the helm in jointly impelling the machinery of government in a direction different from what either one acting by itself would have done and thereby a direction formed from each part. Bogdanor (2009a), in line with many contemporary legal theorists, chiefly and questionably designates the constitutional reforms implemented since 1997 as having fundamentally altered the balance between the executive, the legislature and the

judiciary – and enhancing a separation of powers – and provides little credit to the much earlier EU membership itself as having affected or distorted that separation. It has meant, for Bogdanor (2009a), that the idea of parliamentary sovereignty has been replaced (not enhanced) by that of the separation of powers – a key feature in Britain’s move towards a constitutional state – rather than a state in practice operating on the rule of parliamentary sovereignty bolstered by the historical precedent of a mixed constitution, subsequently impacted upon by EU membership.

There is a partial separation of powers (see Masterman, 2011), particularly between the executive and the legislature and the extent of that separation depends upon the extent to which Parliament asserts itself against the government of the day. The EU helps reinforce that separation. As Bogdanor (2009a) perceptively observes, the traditional British constitution, in line with Bagehot’s view, supposes that there is no separation of powers at all, only a fusion between the executive and legislature, between Cabinet and Parliament, through the Cabinet. Bogdanor holds, contrary to Bagehot, however, there had always been a partial separation of powers given that not every MP is a minister, there is a separation of powers between Cabinet and Parliament and also the extent of that separation depends upon the extent to which Parliament asserts itself against the government of the day which depends upon political vicissitudes (Bogdanor, 2009a, p. 285), although ministers *must* collectively support the government and backbench government MPs only *ought* to. The separation of government and Parliament has also been intensified by the removal of the hereditary peers from the House of Lords (Bogdanor, 2009a, p. 288); with peers chosen specifically for the purpose rather than by birth being more prepared to challenge, or assert a position, against the government of the day. It is Bogdanor’s separation of powers, not Bagehot’s unity of the executive and legislature, under which the defined powers of the Commons at the helm are diluted under EU membership, because the governing weight of the national executive is grafted onto EU governmental machinery, creating uncertainty between the two.

There is ample evidence that the constitutional elevation of the UK executive through its fusion with EU governmental machinery occurs through:

- The Prime Minister, with other Heads of Government and respective Presidents of the European Council and Commission interacting to make decisions at the highest political level in the European Council. Those key decisions of the European Council have been milestones in the political history of the EU, including Treaty change since the Single European Act in 1987, EU enlargement, the development

of foreign policy, the launch of European economic and monetary union (EMU) (Kassim, 2016a) and the UK's triggering of Article 50 to leave the EU.

- The ministers for the executive integrate with the Council of the EU and the other 27 executives to negotiate and make EU laws and take economic, trade, foreign and security policy decisions.
- Ministers belonging to the executive meet in 10 different policy formations in the Council of the EU, economic and financial affairs being just one formation.
- The Prime Minister nominating one Commissioner who stands as one of the 28-member College of Commissioners providing the European Commission's political leadership (Kassim, 2016b).
- The Commission being subject to scrutiny by national government ministers of the member states and by the European Parliament (Kassim, 2016b; Kassim, 2016c).
- The President of the Commission is appointed by the European Council through a qualified majority and with a majority in the European Parliament.
- Ministerial meetings are prepared in detail by diplomats from the executive through the 'Committee of the Permanent Representatives of the Governments of the member states to the EU' (Coreper) and national civil servants perform official functions for Council working groups and committees (Kassim, 2016d).
- EU legislation is eventually implemented by the UK executive (through Departments, agencies and local authorities) with national-level bodies administering 90 per cent of the EU Budget (Kassim, 2016c).

The EU institutions are fused to the executive in this way because they were created by member state executives to help them achieve the objectives described in the EU Treaties (Kassim, 2016c). The legislature cannot be said to have any kind of equivalent connection as the executive within EU-level institutional decision-making through the European Council, European Commission or Council of the EU. The legislature is reported to by the UK executive. It usually decides, due to partisanship in Parliament, to scrutinise but not oppose what the executive has done.

Conceptually, the traditional ultimate decision-making power of Parliament defines a Westminster model of MPs taking ultimate political decisions over policy and laws on behalf of the electorate whose interests and concerns they seek to represent. One common, leading assumption in the research, however, proposes a deparliamentarisation thesis in which EU integration has led to an erosion of Parliament's regulating of the executive

(Raunio and Hix, 2000; Schmidt, 1999), generating a broad executive-legislature gap. The ‘deparliamentarisation thesis’ expresses that the development of European integration has led to the erosion of parliamentary accountability over the executive branch, based both on constitutional rules and the political dynamics of the EU policy process (Raunio, 2011; Raunio, 2009; O’Brennan and Raunio, 2007; Raunio and Hix, 2000). As national governments represent their countries in EU negotiations, this tends to create “informal asymmetries” between the executive and the legislature (Raunio, 2011). In those circumstances, the historical precedent of Montesquieu’s (1748) ‘power checks power’ constitution, in which primarily the executive and the two branches of the legislative act as checks on one another, becomes partly anachronistic.

Bogdanor (2009a) wrongly dismisses the ultimate rule, ‘What the Crown in Parliament enacts is law’ as a rule of recognition in the UK legal system. He does so because his theory cannot conceive of sovereignty invested in a legislative power yet where the state maintains a distributed network of sub-powers. It also assumes that the ultimate, contemporary rule does not state the historically precedented conditions the rule must satisfy in order for it to impose obligations as valid law providing for political settlement. The settlement works because the historical precedent of the mixed constitutional model configures the internal executive, legislature, judicial relations to validate the rule, but Bogdanor (2009a) does not examine this as a form of historical precedent, nor its *unsettling* under EU membership.

It is not evident that a UK rule-based constitutional structure, including the rule of parliamentary sovereignty, within a tripartite constitution, has completely disappeared or given way to complex arrangements of other executive bodies. Loughlin (2010) considers that:

“... in place of a clear, symmetrical, rule-based constitutional structure, we are obliged to examine a complex arrangement of government in which local and non-public bodies play important roles and where knowledge and other flows are no longer linear but recursive.” (Loughlin, 2010, p. 416)

The author therefore dismisses that the activity of governing takes shape within a tripartite structure of the executive, the legislature and the judiciary – and instead it occurs through an elaborate administrative network of persons, institutions, practices and processes involving a mixture of public roles (Loughlin, 2010, p. 416). It is not clear that a rule-based structure such as the rule of the recognised helm necessarily gives way to complex

arrangements of other public bodies – rather they confirm it. The convention of the tripartite structure likewise does not dissipate, but can often permit, an elaborate administrative network.

The growth and magnitude of EU administrative powers at the UK helm of state does raise concerns over the limits and dilution of the traditional separation of powers doctrine, given their influence on the supremacy of the executive, the dilution of the domestic legislature and the strengthened basis of administrative law in the judiciary, impacting upon the weakening and unsettling of parliamentary sovereignty. As Loughlin argues, the emergency of a separate system of administrative law and administrative powers of government has been tied to governmental modernisation and centralisations (Loughlin, 2010, p. 436). The system of administrative law that emerged in Europe during the 18th and 19th centuries was antithetical to English ways of governing consistent with the common law tradition (Loughlin, 2010, p. 444), the principles of parliamentary sovereignty and the rule of law (Loughlin, 2010, p. 441). It is an overstatement of the position however where more radical analysis such as that of Rubin reduces the mixed constitutional model to ‘heuristic’ or ‘metaphor’ and the three branches of government “exist only in our minds” (Rubin, 2005, p. 2995; Loughlin, 2010, p. 447). The growth in scale and complexity of contemporary government through administrative arrangements has made the recognition of a mixed, tripartite structure particularly acute.

For Loughlin, the growth of administrative power raises doubts about whether we can continue to work within the understanding of a separation of powers (Loughlin, 2010, p. 448) – although it might be more helpful to consider the influence EU administrative powers have had on the increased concentration of mixed powers than to abandon it. Loughlin credibly proceeds to argue for the rise of the elaborate networks (or ephorate, as he refers to it) – in which ministers are at the apex of the system – being replaced by differentiated arrangements, domestic and European, with elaborate service networks and public bodies (some 650, including the BBC) which operate at some remove from electorally authorised sources of authority (Loughlin, 2010, p. 448). This does not mean, as Loughlin suggests, that unaccountable bodies are now emerging to constitute a new fourth power but that they help inform parliamentary sovereignty. Yet it can mean, as Loughlin suggests, that public bodies do not generally exercise governmental power but they have a major impact on policy decision-making (Loughlin, 2010, p. 450). It is not necessary to view the network as a new branch of government comprising office-holders who possess the type of expertise and specialised knowledge that has enabled the basis of effective governmental decision-making. An interpretation of Edmund Burke’s view that the

sovereignty of Parliament is located in a balanced constitution configured around a triangulated trust between the Crown and Parliament's chambers (Craig, 2012, pp. 106-8) now incorporates the EU into that constitution. This dilutes the trust and balance necessary for the inter-relationships in the mixed constitution and its dislocating of the sovereignty of Parliament.

The nature of the EU's interaction with the mixed constitutional model in the UK parliamentary sovereignty structure occurs in the context of the rise of the administrative machinery. In that machinery, the network bodies realise their potential through an original, not delegated authority. It is an original, not delegated, authority because the delegating authority from the Commons' is diluted under EU membership, the authority of the executive is preserved, if not enhanced, and judicial power is further enhanced through decision-making over competencies or competition in the administrative machinery. The evolution of the EU has meant the rise of the administrative machinery where EU functions relate to the acquisition of technical knowledge in specific regulatory fields, assisting intergovernmental institutions e.g. Council of Ministers, to make policy decisions (Loughlin, 2010, p. 463). The extent of the development of the modern EU has meant it is increasingly greatly more supranational than Loughlin observes and could hardly be illustrated as an entity that merely assists intergovernmental institutions. It has its own supranational political powers and institutions also.

It is conceivable in the EU context that the growth of administrative agency power (Egeberg and Trondal, 2017) threatens to 'unbalance' the separation of powers doctrine, particularly where bodies realise their potential through a newly developed and original, not delegated authority. It is not completely proven, however, that there is a fourth branch of government of increasingly complex, specialised, expert public bodies, or that it proposes completely breaking the tripartite structure. It need not be certain either that the new paradigm creates an alternative image of government as network – there are many agencies, domestic and European, and with a plurality of functions and purposes. In the domestic context, it is worth bearing in mind the domestic Coalition Government's (2010-2015) policy of the 'bonfire of the quangos', or 106 non departmental public bodies which closed, drastically reducing their number (*The Guardian*, 2012), meaning those elaborate networks not only extend but contract. An administrative apparatus, largely an extension of governmental institutions and which mostly execute policy, are a layer of executive agencies which need not be viewed as a cumbersome complex network, overriding the tripartite structure, but rather changing its relationships. It can occur simply because, as Egeberg and Trondal (2011) argue, EU level agencies become building blocks in a

multilevel union administration, partly bypassing, for example, national executives (see also Egeberg and Trondal, 2017).

By recognising that parliamentary sovereignty creates the tripartite mixed constitutional model and that the mixed constitution informs parliamentary sovereignty, the crisis of Bogdanor's zero-sum game is averted – the UK can have both parliamentary sovereignty and a pragmatically organised, partial separation of powers. The recognised helm incorporating EU institutions entails the fusion of the executive with EU machinery, the dilution of the domestic legislature to 'have its way' and the fusion of the judiciary with the Luxembourg court system, which dilutes the strength of parliamentary sovereignty. But Bogdanor (2009a) recognises that there is a partial separation of powers, particularly between Cabinet and Parliament and that the extent of that separation depends upon the extent to which Parliament asserts itself against the government of the day.

Political theorists such as Richard Bellamy (1996) have credibly argued that the classically mixed government model is historical, or of the past. However, to diverge from Bellamy's work, it also remains important to capture that past historical constitutional form as relevant to parliamentary sovereignty's historical meaning which has a share in the composite parts provided by the ultimate rule of 'What the Crown in Parliament enacts is law'. Hart's (1997) ultimate rule, Bellamy's (2007) consideration of the rule of persons including Hobbes' primacy of a political body of persons to decide on rules of law, all point to the assumed or acknowledged consensus between officials/persons between different institutional parts of the state. That is relevant because the ultimate rule rests upon the sharing of the space at the recognised helm with institutional executive, legislature and judicial parts where there is an assumed or acknowledged consensus between persons in those institutional parts. When parliamentary sovereignty co-exists in the modern constitution with at least a partial separation of powers, the purported existence of a wider plurality of competing public and private agencies does not make an efficient check, as might be thought, but presents a problem for those distinct parliamentary powers governing at the helm.

EU institutions and agencies incorporated into government exert an influence through the supremacy of executive agencies (Egeberg and Trondal, 2017; Egeberg and Trondal, 2011) as above domestic legislative-scrutiny powers. It is not evident however that a UK-rule based constitutional structure, including the rule of parliamentary sovereignty, within a tripartite constitution, has given way to complex arrangements of local or non-public bodies, as Loughlin strongly indicates. Rather, the rule-based structure

confirms and provides for the complex administrative arrangements, even though at the institutional level European administrative bodies (e.g. the European Banking Authority, European Food Safety Authority and the European Defence Agency) compete at the recognised helm. The nature of EU interaction with the mixed constitutional model in the UK parliamentary sovereignty structure occurs in the content of the rise of the administrative machinery and where network bodies realise their potential through an original, not delegated, authority (e.g. Egeberg and Trondal, 2017; Wonka and Rittberger, 2010; Gilardi, 2002). It is an original, not delegated, authority because the delegating authority by the Commons' is diluted under EU membership, the authority of the executive is enhanced since it evolves to a degree on its own terms (i.e. without delegated instruction) and the judicial power is fused into the Luxembourg court system.

Parliamentary sovereignty and the contemporary mixed constitution under EU membership: the case of the Financial Transactions Tax (FTT)

The European Commission's proposal for an EU-wide tax on transactions in financial instruments, including 0.1 per cent for standard transactions on stocks and bonds and a 0.01 per cent tax for transactions in derivatives, was first set out for member states in 2011 as a measure to recover cost of the financial crisis from banks (Council of the EU, 2013; EU Committee, 2013). It was a partly popular measure in the light of the global financial crisis in which banks were deemed responsible for failures leading to the crisis. The tax was to be payable not by individuals but financial institutions located within a member state participating in the tax measure. The rationale for the tax was also grounded in regulators reducing risk, to level the playing field (VAT) and EU tax harmonization. At the time, France and Italy had already introduced national financial transaction taxes. The proposed tax is to be imposed on a wide range of financial transactions where at least one party to the transaction is a financial institution established in a member state participating in the Financial Transaction Tax. It appears, at the time of writing, "highly questionable" whether the tax will be implemented at least as originally conceived (Kastner, 2017). It is currently "less ambitious" as a watered-down, narrow-based tax on a limited number of transactions (Kastner, 2017). The proposal remains stuck in stalemate in the EU Council working group meetings with significant differences remaining among the ten participants (see Moscivici, 2017; Barbiere, 2017).

Changing the inter-related pragmatically organised, partial separation of powers

A consideration of the Financial Transaction Tax demonstrates precisely how the recognised helm has incorporated the EU institutions into its helm through an influence on the executive, the legislature and the judiciary, indirectly impacting upon parliamentary sovereignty. There are other recent examples in which this could be argued, including the Advocate-General to the ECJ dismissing the arguments of the UK Government in its attempts to block proposed EU restrictions in banker bonuses as a ration of salary (see Barker, 2014a; Freshfields Bruckhaus Deringer, 2013; Euractiv, 2013) and also the ECJ dismissing the UK Government's and parliamentary arguments to attempt to retain its national power over short selling in the markets, as compared with the new powers given to the EU-level European Securities and Markets Authority (ESMA) (Barker, 2014b; House of Commons, 2011; BBC News, 2014b) but this chapter will focus exclusively on the financial transactions tax. The financial transactions tax notably centres upon an EU-derived policy which invokes responses from across the executive, legislature, judiciary and the electorate. It is an example of taxation which itself classically falls under the remit of policies that Parliament is sovereign over. What will become clear is that Vernon Bogdanor's zero-sum game that the UK cannot have parliamentary sovereignty but instead an enhanced separation of powers is expressed differently: the UK retains its rule of parliamentary sovereignty, but has altered its strongly inter-related pragmatically organised, partial separation of powers through EU obligations. Neither does Hart's ultimate rule need to be consigned to the past, as Bogdanor (2009a) assumes, because the direct challenge by the Financial Transaction Tax to the ultimate rule does not occur. A brief consideration of the EU-level financial transaction tax demonstrates those key inter-relationships.

The UK has agreed to the powers of the European institutions through the EU Treaties. In particular, in this context, the supranational European Commission:

- Is one of the main institutions of the EU upholding the interests of the EU as a whole.
- Is generally understood to be "a genuinely supranational body" (King, 2007, p. 103),

- Is referred to as the ‘guardian of the Treaties’, meaning that it checks that each member state applies EU law properly.
- Has the complete ‘right of initiative’ in policy areas covered by the Treaties – it can propose new laws in accordance with the subsidiarity principle, meaning, in theory, it deals only with issues that cannot be dealt with effectively at national, regional or local level (European Union, 2014) and only in policy areas where the Treaties provide for action.
- Is the administration as well as providing a degree of policy and political direction (Hooghe and Kassim, 2012) which also depends on, for example, other actors such as the Council Presidency.
- Drafts proposals for new European laws and “manages” the day-to-day business of implementing EU policies.
- Exerts a strong influence over policy debates and in steering the EU as a whole.
- Contains 28 Commissioners, one from the UK and each member state, providing the Commission’s political leadership during their five-year term. Each Commissioner is assigned responsibility for specific policy areas by the President. At its political level, the College of Commissioners are independent of member state governments. Commissioners swear an oath of independence when elected (Peterson, 2012).
- Has independent powers over the Common Agricultural Policy (CAP), external trade and competition policy.
- Owns the agenda for all issues relating to the internal market and cohesion policies.
- Alongside the Council and Parliament, sets long-term spending priorities for the EU in its ‘financial framework’.
- Draws up the annual budget which must be approved by the Parliament and the Council.
- ‘Supervises’ how EU funds are spent by agencies and national and regional authorities.

The European Commission explained its original Financial Transaction Tax proposal as a transaction tax that would avoid fragmentation of the internal market for financial services and ensure that financial institutions make a fair contribution to covering the costs of the financial crisis (see the House of Lords EU Committee, 2013). The earlier proposal by the Commission to be adopted by all member states had the grander aim of creating a new

revenue stream which could gradually displace national contributions to the EU budget, lessening the burden of national treasuries. It is because of the UK (and Sweden's) objections that the original Commission-led EU-wide proposal for a Financial Transaction Tax in 2011 was blocked – and was thereby permitted to be adopted as an amended version of the tax through the 'enhanced cooperation' method with 11 (Council of the EU, 2013), then subsequently, only 10 member states (Barbiere, 2017). The 'enhanced cooperation' is an EU procedure in which EU members (a minimum of 9) can jointly pursue a policy of advanced integration or cooperation within EU structures, but without all the other EU countries being involved (EUR-Lex, 2017). However, as the proposal was subsequently pursued and amended by 10 member states under enhanced cooperation, it makes it unlikely that the tax could be used as a stream of revenue for the EU budget.

Traditionally, under the mixed Westminster model, it is the House of Commons as an institution which provides the means for a Government's dominant, partisan parliamentary majority to provide financial supply and support the executive. This is because the 1689 Bill of Rights established for the House of Commons a sole right to authorize taxation and the level of financial supply to the Crown. And it is historically the executive which initiates the taxation measures, not the European Commission. So, paradoxically, the scope of weakened, minister-led, executive-sanctioned EU decision-making powers exerted through the Council of Ministers widens significantly into the sphere of legislative consent-providing powers. Under contemporary EU membership, the Commission however has the complete 'right of initiative' – it can propose new laws in accordance with the subsidiarity principle and in policy areas where the Treaties provide for action. Domestically, the role of ministers in government and policy officials are diluted down in an executive scenario where they are at the recognised helm, to theoretically propose and draft Government bills, because they do not 'initiate' the proposed tax. This occurs despite the European Commission being subject to *scrutiny* by the national executive and those of the 27 EU members (Kassim, 2016b). The legislature however has no comparable connection to that of the Prime Minister and Cabinet in the executive within European Commission-level institutional decision-making. National legislatures have therefore themselves in this process lost traditional legislative powers of initiatives to hold to account, to amend and subsequently approve all final measures (Raunio, 2011; Raunio, 2009; Schmidt, 2005; Raunio and Hix, 2000).

Executive and judicial powers are clearly separated at the UK helm of state, but judicial decision-making moves ever closer into the scope previously defined by executive decision-making at the recognised helm. This process occurs as national judiciaries become more independent of the executive as a consequence of their EU-related roles (Schmidt, 2005). On 17 April 2013, the UK Government made an application to the ECJ for the annulment of the Council Decision authorising enhanced cooperation in the area of the Financial Transaction Tax (*UK v Council of the EU* [2014]). The application focused on the extraterritorial elements of the tax. In that form, the Financial Transaction Tax Directive would infringe the rights and competences of non-participating member states by departing from accepted international tax norms. The UK Government were concerned about the ‘deemed establishment principle’ (House of Lords EU Committee, 2013, p. 11), where, for example, a UK bank would be deemed to be established in a participating member state (e.g. Germany) by virtue of their transactions involving bonds in that participating state. The scope of judicial decision-making widens into the sphere of Commons/legislative and executive decision-making at the recognised helm when the ECJ is able to dismiss, as it did, the arguments of the Crown-in-Parliament in its attempts to block the tax on financial trades, and despite a UK veto at the EU level in the legislative process (Barker, 2014c; *UK v Council of the EU* [2014]). The law is to be applied by judges but the political sphere is divided and the open-ended politics over the tax remains contested. It has nevertheless been the case that the UK entry into the EU brought about a significant expansion of judicial power, not least because of the supremacy of EU law (Blauberger and Schmidt, 2017; Tabarelli, 2013, p. 346; Weiler, 1991; Weiler, 1994). A judiciary once obliged to merely give effect to the statutes of Parliament under the Westminster model overlaps at the recognised helm with the proposing of taxation usually reserved for the executive – and furthermore, overlaps with the dominant, partisan, Government majority in the House of Commons who legitimately expect to sanction the tax.

A substantial body of literature explains how European integration tends to encourage such a judicialisation of politics (Weiler, 1991; Weiler, 1994) and spreads a juridified mode of governance, or ‘Eurolegalism’ (Kelemen, 2012, p. 55). This assumes that judicial institutions can answer deeply political questions on taxation. Compared to legislatures, unaccountable courts tend to do more to serve the interest of powerful

economic actors and vested interests (Hirschl, 2004; Bellamy, 2008). At the European level, there is a widespread consensus that the ECJ has played a major part in the progress towards European integration (Easson, 1989) – “an indispensable role” as a motor of European integration (Kelemen and Schmidt, 2012), particularly as its substantive role ensures that the law is observed in the interpretation and application of the Treaties. The court has for many decades been accused of “being an excessively activist judiciary” (see reports by de Waele, 2010, p. 3). Such a judicialisation of politics in Europe has led courts to become involved in nearly every major political and policy dispute imaginable (Kelemen, 2012, p. 59), including that of the Financial Transaction Tax.

Enhanced cooperation over indirect taxation, the absence of parliamentary consent and executive-legislative fragmentation

Although the court dismissed the UK’s challenge because their view was directed at elements of a future tax which was yet to be agreed, the tax continued to be pursued by a Eurozone grouping of 11 (Council of the EU, 2013), and subsequently 10 member states, through enhanced cooperation (after Slovenia later withdrew) (Moscivici, 2017; Barbiere, 2017). The ruling also confirms the UK has limited power to block the Eurozone from pursuing joint policies under enhanced cooperation that potentially damage UK interests, even in the field of taxation where the UK retains its vetoes on EU rules (Barker, 2014c). The UK helm of state necessary for the governance of the realm has judicial EU institutions incorporated into its government through a direct competitive overreach, or dilution, of the executive powers which impacts upon the comparative weakening of legislative powers in the Commons to ‘have its way’ vis-a-vis the ECJ and thereby an unsettling of parliamentary sovereignty.

The balance of parliamentary scrutiny powers as against those of the executive remain distinct but the executive decision-making dilutes the House of Lords powers of scrutiny and the role of the legislature in general at the recognised helm. In terms of assessing specific impacts of the EU on the UK, Parliament itself, as distinct from executive, has two special committees by both Houses of Parliament which exercise scrutiny functions for Parliament in assessing the impact of EU legislation and activity (Bradley and Ewing, 2010, p. 136). The UK Parliament has a European Scrutiny Committee and three European (standing) Committees in the Commons, and an EU

Committee with (currently, six) sub-committees in the Lords. The House of Lords' EU Committee were highly critical of the measure and the Government's treatment of the tax on an ongoing basis (EU Committee, 2012), insisting that there was a substantial risk that financial institutions would relocate outside the EU if a Financial Transaction Tax was introduced, with serious consequences for the City of London and for the EU economy as a whole (EU Committee, 2013, p. 7). The Committee were consistently critical of the measure, stating:

"The proposal would clearly have a significant adverse impact on financial institutions established in non-participating member states by making them liable for the Financial Transaction Tax under either the deemed establishment or issuance principles." (EU Committee, 2013, p. 86)

The Committee condemned the process as being 'divisive', 'significantly detrimental to the UK's interest' and 'deliberately contentious in such a controversial area'. They were strongly critical of the Government in their approach to negotiations at an EU Economic and Financial affairs Council (ECOFIN) vote on 22 January 2013, authorising the use of enhanced cooperation. The Government merely abstained rather than voted against the authorising decision, and did not encourage other non-participating member states to vote against, given that fewer than one half of member states advocated the tax (EU Committee, 2013, p. 10).

The committee played a significant part in contesting not only the Financial Transaction Tax but more importantly, the Government's overall approach to the tax. The committee were very concerned of the damage caused by a Financial Transaction Tax introduced by a smaller group of EU member states but found only a "marked complacency" within the UK's HM Treasury as to the potential deleterious impact, a serious underestimation of the political will amongst supporting member states and an inadequate response to the committee's report (EU Committee, 2013). The committee even viewed the Government's initial assessment to be based on the assumption that the UK stood to benefit from a Financial Transaction Tax imposed by other member states. Nonetheless, the Government declined proper responses or negotiations with the committee and finally pursued a legal challenge – rather than adhere to Lords' suggestions and proposals throughout the legislative process, and subsequently lost. The recognised helm has incorporated EU institutions such as ECOFIN which reciprocate the strength of the executive role in EU government machinery. This is particularly the case in minister's qualified majority voting at the EU Council. That process leads to a direct dilution of

Lords' and Commons' scrutiny and voting powers (House of Commons' European Committee B (2013)) and to the weakening of legislative scrutiny powers and of parliamentary sovereignty.

Of course, the UK, through the European treaties and its regular practices, have agreed that through the intergovernmental Council of the EU, or the EU Council (previously known as the Council of Ministers), its own national ministers and those from all member states meet to adopt laws and coordinate policies. The Council of the EU has several defining features:

- Through that institution, the UK and all EU partners pass EU laws and coordinate the broad economic policies of EU member countries, including surveillance, budgetary and public finance monitoring – and although outside of the UK's remit, the legal, practical and international aspects of governing the euro (European Union, 2014).
- The Council consists of representatives of the UK and all other member states, each member state being represented by a minister, who is authorised to commit the government of that member state and to cast its vote (Bradley and Ewing, 2010, p. 120).
- The UK and each member state sends their minister for the policy field being discussed at each Council meeting.
- The Council as an institution enables the overarching objective of the UK and all other members to articulate and consolidate their national interests by representatives of each of the national governments by legislating jointly with the European Parliament (Hayes-Renshaw, 2012, p. 68).
- Through the UK's participation, the overall Council provides a co-ordinated economic and employment policy for Europe within the competences of the Treaties, coordinated by the finance ministers of the member states.
- The Council is required to act by a qualified majority vote unless the Treaties provide for another procedure e.g. simple majority or unanimity.
- The UK votes more often than other EU member states against EU measures, but even so, rarely votes against proposals (Thompson and Harari, 2013). Nonetheless, the UK is now the country that is least similar in its voting behaviour to other EU member states, is the only one of the large member states to contest more often, and is the “furthest removed in its voting behaviour from the other coalitions in the

Council”. It has been referred to as playing “in a league of its own” (Van Aken, 2012).

During the EU policy process, executive decision-making powers shift away from their traditional role of accountability to the House of Commons’ consent-providing powers (Raunio, 2011; Raunio, 2009) in the field of taxation. While the power to levy taxes remains central to the sovereignty of UK and other EU member states, there is some agreed limited UK competence for the EU in this area – outside of personal direct income taxes – which enable the smooth running of the single market, the harmonisation of indirect taxation (e.g. value-added tax (VAT), excise duties, import levies, and energy and other environmental taxes), fighting tax evasion and avoidance, tax challenges to fair competition and money laundering, and the potential proposal for a common consolidated corporate tax base (Paternoster, 2016). It is widely debated in the literature that almost without exception, “national parliaments are unequivocally considered the ‘losers’ in European integration because of their severe loss of competencies” (Sprungk, 2013, p. 298) and it has been briefly discussed how the executive experiences the loss of the ‘right of initiative’. The executive voluntarily shorn of its initiative at the helm, but which integrates its functions as a qualified majority voting stakeholder in the Council of Ministers – ECOFIN in this case – effectively bypasses the scrutiny system in the Lords’ and Commons’ (House of Commons’ European Committee B (2013)). In that process, the executive retains a significant degree of discretion over policy-making where Parliament is made partially absent as an actor.

This process occurs as the elevation of the executive through its fusion with EU governmental machinery is strongly maintained through its relationship with the Council of the EU. The ministerial executive integrates with the Council of the EU and the other 27 executives to negotiate (Kassim, 2016d) and attempt to create such taxation measures. The ministers, diplomats and civil servants belonging to the UK executive attend the meetings of the Council of the EU (Kassim, 2016d) to set out their respective positions on the tax. Specialised EU decisions are taken by those ministers. The legislature has no comparable connection to that of Cabinet ministers in the executive within EU Council-level institutional decision-making.

As one tax adviser told the House of Lords EU Economic and Financial Affairs and International Trade Sub-Committee, when providing evidence on the measure:

“A substantial part of the tax paid to Brussels would therefore be at the cost of the British taxpayer, simply transferring revenue from the UK budget subject to Parliamentary scrutiny (and a National Audit Office which is allowed to be effective) to Brussels where there are no such safeguards.” (Chown, 2011, p. 108)

More broadly, the development of the EU’s quasi-institutional structures has significantly affected all member states’ structures by altering the traditional power and authority of national governments (Schmidt, 2005).

The Commons consenting to indirect taxation in the precedent, historical convention of the mixed constitution is highly relevant to parliamentary sovereignty’s historical meaning. Where EU membership results in the scope of executive decision-making powers strengthening to make law for the whole of the EU within a Council of Ministers arrangement, shifting away from a national sphere of legislative consent-providing powers, it dilutes the relevance of that historical precedent.

Given the tense debate between the Conservative MPs during this period and the Coalition Government and the Prime Minister, there is initially both a uniting and contesting, rather than strict separation, of powers between the executive and legislature because the majorities of each were all in opposition to the tax (to differing degrees). Subsequently, despite the later fact that at the original ECOFIN vote on 22 January 2013, authorising the use of enhanced cooperation, the Government merely abstained rather than voted against the authorising decision which the Lords’ committee then strongly criticised (EU Committee, 2013).

The dispute did not terminate at this stage and as will be discussed, the political cleavage between Government and Parliament re-opened the debates for more urgent referendum legislation on EU membership after that failure of the Government’s legal challenge at the ECJ, which the Commons majority had originally supported. An unregulated, political and irregular division opens up between Government and Parliament because (i) the Government has no ‘initiative’ in this case, as compared with the Commission and European Parliament; (ii) the Government’s reciprocity, engagement and trust through ECOFIN, the European Parliament and the court proved ineffective, and (iii) traditionally, the House of Commons is the means for the Government’s dominant, partisan majority to provide financial supply and in this case, their vote against the tax is partly opposed and bypassed at the EU-level.

The rule of the recognised helm preserved?

It is relevant to acknowledge that the upholding of the ultimate rule of parliamentary sovereignty is notably dependent upon an acknowledged consensus between Government and Parliament and even at the EU-level within the different institutional parts. For example, when the Government abstained against the authorising decision, ministers did so on the basis (however paradoxical) that if they attempted to block others from proceeding, they would have undermined the broader EU consensual principle of national sovereignty over taxation matters. Again, the then Financial Secretary to the Treasury, Greg Clark, reflecting the House of Commons' European Scrutiny Committee view, observed that the measure raised questions relating to parliamentary sovereignty and primacy (House of Commons, 2013). Although proceeding in fundamentally different ways, both Government and Parliament openly acknowledged a rule of sovereignty in the protection of taxation measures.

Furthermore, within the EU itself, the Legal Service of the Council on 10 September 2013 notably played a significant part in the political discourse by identifying several critical aspects of the revised Financial Transaction Tax (Barker, 2013). It argued that the 'deemed establishment principle' – affecting financial institutions established in non-participating member states – did not comply with the Treaty conditions through enhanced cooperation because: (i) it exceeded member states' jurisdiction to impose tax extraterritorially; (ii) it infringed the competences of non-participating member states (e.g. UK); (iii) it was discriminatory and likely to lead to distortion of competition to the detriment of non-participating member states (e.g. UK) (Barker, 2013). In the opinion of the Legal Service of the Council, there would be insufficient connection between the taxpayer and the member state imposing the tax (Barker, 2013). It would fail to respect the competence of non-participating member states as the Financial Transaction Tax would be imposed on institutions resident in their territory by and to the benefit of the participating member state despite the fact that the primary competence to taxation lies with the non-participating member state (EU Committee, 2013, p. 16). The Commission immediately rejected this opinion (House of Lords' EU Committee, 2013, p. 8). The opinion of the Legal Service of the Council, in short, while not specifically referring to the problems as relating to sovereignty, did infer concerns over taxation sovereignty when the tax exceeded member states' jurisdiction to impose tax extraterritorially and that there would be

insufficient connection between the taxpayer and the member state imposing the tax (Barker, 2013). While the recognised helm has incorporated EU institutions into its government – and although the ECJ marginalised the Opinion of the Legal Service of the Council, there was ultimately a dilution of the executive powers impacting upon the comparative weakening of legislative powers in the Commons. Despite this trend there remained wider acknowledged consensus, both domestic and European, on the UK's ultimate rule as protecting domestic, territorial, budgetary sovereignty. This suggests that the EU will not as a whole transgress more fundamental principles of territorial, budgetary sovereignty over taxation – applicable not just to the UK but all member states – but where it can potentially gain voluntary consent (i.e. through enhanced cooperation), it can by gradual developments accrue that power.

So far, despite the presentation of proposals, the EU has had difficulties accruing such power to construct the tax (Kastner, 2017); leaving tax sovereignty and parliamentary sovereignty broadly intact. The recognised helm with its limited legislative-sanctioned power and through the exercise of executive power can voluntarily choose to not participate in, and therefore not incorporate, specific EU measures which might impact upon its claims to sovereignty.

The fracturing of executive-legislative relations – the open door for parliamentary and popular political campaigns

Through political contestation, the subsequent impasse in which the Government has not yet realised the policy it had set out, or to have reformed or blocked it in the EU legislative process, and having further lost their legal challenge, heightened the fracturing of executive-legislative relations arising from EU policy. The dispute drove the policy into a deeply contentious political debate and the UK Government's proposed high-level EU renegotiation with other member states. The tax, by nature of the executive-legislature division in the Commons became part of the deeper, political EU treaty renegotiation agenda being sought by the then UK Prime Minister, David Cameron (Parker and Barker, 2015). It is perhaps in the House of Commons where the division of powers is most observable. In the past, post hoc Prime Ministerial statements in the Commons' on the European Council meetings or the Chancellor's announcements on ECOFIN meetings have long been perceived to be weak guarantees of Westminster accountability for ministerial

decisions made at the EU-level. The government's own backbench MPs disaffection in Parliament to the Government's impasse in its European policy and strategy drove a deeper political wedge in executive-Commons relations. The unregulated and political division is created where the Government demonstrates reciprocity, comity and trust in the Council and court system of the EU at the expense of comity and trust with the House of Commons as the means for the Government's dominant, partisan majority to provide their ultimate consent to a tax. The process confirms Bogdanor's political intervention on Bagehot: there is a partial separation of powers, particularly between Cabinet and Parliament and the extent of that separation depends upon the extent to which Parliament asserts itself against the government of the day (Bogdanor, 2009a, p. 285). Neither Parliament, nor its dominant, partisan majority found a need to strictly assert itself against the government of the day because the Government were already in opposition to the measure – but as a 'new phase' opened up, following the initial ECJ legal challenge which failed, the separation of power between executive and the elected legislature seemed further deepened as backbench Conservative MPs pushed for more urgent EU referendum legislation and the Prime Minister pledged a renegotiation of the UK-EU relationship.

By nature of the contested political, open-ended situation of possibilities, including the then potential outcomes of the EU referendum and Prime Ministerial renegotiation, and despite the ECJ judgement, the finality of the UK accepting the Financial Transaction Tax continued to proceed within the political sphere. The fracturing of executive-legislative relations creates an open door for parliamentary and popular politics. Political possibility is open-ended because the historical constitutional forms contain a conceptual system of discourses, which are open to the possibility of constant modification (consistent with Prokhovnik, 2008), permitting contestability between the present constitutional form and other historical forms. The custom of the mixed constitution conflicts with the modern customs and assumptions of modern parliamentary sovereignty.

The Government's approach to the Financial Transaction Tax was contested by a parliamentary opposition and a popular opposition organised by several campaign groups. Those national and sub-national groups and minority political groups seeking support for the Financial Transaction Tax who found their views underrepresented in the Commons' subsequently found a greater collective representative capacity in the European Parliament which strongly voted for and supported the tax. By its nature, this produces a negative or poor stature of the Westminster Parliament in the eyes of minority political groups. The European Parliament's competition at the recognised helm directly undermines the

representative capacity of the Commons – the Commons, without an executive-led majority to support the proposed tax remains, in the eyes of minority and sub-national groupings, less trusted than the EU parliamentary and court system for giving them the tax/right they desired. The ‘deparliamentarisation’ of the system occurs under the rise of the executive branch and notably a Westminster submission to a “legislative powerhouse” (Kohler, 2014) of the European Parliament. The Government won its parliamentary votes on Motions sceptical of the tax, although the Government won those votes through the support of dominant, partisan majorities in Parliament. But this was not unopposed. The strength of public anger directed against the financial sector and the view that those who contributed to the financial crisis should contribute to its costs resonated in popular political and mainstream opposition Labour Party discourses and in proposals for some form of transactions tax (House of Lords’ EU Committee, 2013, p. 7), indicating support for the Financial Transaction Tax. In the UK itself, 65 per cent were in favour (while 25 per cent opposed) a Financial Transaction Tax (Labour Party manifesto 2017; Labour Party EU Manifesto, 2014; House of Commons, 2013; Eurobarometer, 2011).

As against the Conservative-led Coalition Government’s position, the Financial Transaction Tax proposal followed a historically strong socialist origin in Europe and there have been many testimonies from those who campaigned for the tax (Ford, 2012). The recognised helm has since 1979 had a directly elected European Parliament incorporated into its governing institutions. This has led to an influence on the balance of the executive, and judiciary, along with a dilution of the domestic legislature by a European legislative body, which impacts indirectly upon parliamentary sovereignty. The Lisbon Treaty in late 2009, brought further law-making powers to the European Parliament that put it on an equal footing with the Council of Ministers and which further diluted the position of the domestic legislature. The executive and judiciary receive a deep engagement in the EU system – through ECOFIN votes, the European Parliament involvement in the legislative process and a court challenge through the ECJ (Barker, 2014c; EU Committee, 2013; EU Committee, 2012). However, the domestic legislature, in which the Commons has primacy, receives virtually no equivalent form of engagement. To make this observation is to acknowledge the relationship between the precedented, historical constitutional form of the mixed constitution in the sixth of the eight historical forms as relevant to parliamentary sovereignty’s historical meaning. Ultimately, where EU membership results in the scope of EU-integrated Prime Ministerial (European Council) and executive decision-making powers (ECOFIN) moving into the remit of Commons’ consent-providing powers through reciprocity and engagement at the EU-level, it unsettles that precedent.

Tax-collecting powers diluting the basis of mixed government through non Westminster-delegated authority

Contrary to Loughlin (2010), it is not as if a UK rule-based constitutional structure, including parliamentary sovereignty, within a tripartite constitution, has completely disappeared or given way to complex arrangements of local and non-public bodies. But Loughlin, it seems, may be justified in arguing for the rise of the elaborate networks – in which the objectives of ministers at the apex of the system are being diluted at the recognised helm by differentiated arrangements with elaborate service networks such as an EU-sanctioned HMRC and other public bodies which for those explicit EU purposes, operate at some remove from electorally authorised sources of authority.

Furthermore, the nature of the EU's interaction with UK parliamentary sovereignty occurs in the context of Loughlin's purported rise of the administrative machinery. It strengthens the hand of the executive at the helm and where network bodies realise their potential through an original, not delegated authority (e.g. Wonka and Rittberger, 2010; Gilardi, 2002), it dilutes the Commons' historic capacity to sanction tax-collection. The growth of administrative powers threatens to unbalance the legislative as against heightened executive, tax-collecting powers, diluting the basis of mixed government, particularly where EU-sanctioned bodies realise their potential through a newly developed, original, and not Westminster-delegated authority.

For example, it has been importantly suggested in the course of events that by implementing The Mutual Recovery Directive in relation to the Financial Transaction Tax, if one of the parties to that financial transaction was established in the UK then the tax authorities of the Financial Transaction Tax member state would be able to request the UK's HMRC to collect and account for them when the tax is imposed directly or indirectly (EU Committee, 2013). It has been heavily scrutinised because the involvement of the HMRC to collect the tax is of higher relevance when the employment of executive agencies for European purposes again fuses the executive into an administrative order where the rules are separate and different.

While it is accepted parliamentary sovereignty co-exists in the modern constitution with at least a 'partial separation of powers', the contemporary existence of a wider plurality of competing public and private agencies can present difficulties for those distinct

but diluted powers governing at the helm. The HMRC is not operating with normal domestic tax-collecting circumstances in this case. The HMRC operates within a plurality of competing public and private agencies which do not overcome the worry that checking might subvert the independence of a branch of government/ institution, but rather unsettle the operation of other branches of government.

The elevation of executive agency powers occurs as EU legislation is eventually implemented by the UK executive. In this case, the recognised helm has incorporated EU-sanctioned national executive agencies into its government notably through an influence on the elevation of executive agency powers, with limited involvement of the legislature-sanctioned power, impacting indirectly upon the dilution of parliamentary sovereignty.

Conclusion

This chapter has argued that Parliament remains *theoretically* sovereign because the ultimate rule of parliamentary sovereignty rests on the precedential and structural basis of the mixed constitution in which the executive, the legislature and the judiciary are intermeshed as functionally separate, but practically inter-related. Yet Parliament is *practically* less sovereign because the recognised helm under EU membership institutionalises a *fusion* of the executive with EU machinery, the *dilution* of the domestic legislature and the *fusion* of the judiciary with the Luxembourg court system, unsettling the political precedents of parliamentary sovereignty. It unsettled prior historical constitutional forms in which the powers of the executive, the legislature and the judiciary are now joined by the EU in jointly impelling the machinery of government in a direction different from which either one acting by itself would have done, thereby a direction formed from each part. The theoretical explanation of parliamentary sovereignty rested upon the sixth of the eight historical forms, illustrating the meaning of the mixed constitution attributed to parliamentary sovereignty.

In comparison to other approaches, it was valuable to examine the ultimate rule in the sixth historical constitutional form of ‘What the Crown-*in*-mixed constitutional Parliament enacts is law’ (1690-1790s) requires balance against its political custom of the mixed constitution to support the rule. The view in the House of Commons’ recent procedural guide, *Erskine May* that the contemporary, changing relationships between the executive, the legislature and the judiciary have been remarkable because of the interaction

with the EU is a pertinent observation (Jack et al., 2011). Preceding 1973, the recognised helm necessary for the governance of the realm depended upon those historically precedented inter-relationships, which in turn have diluted the strength of parliamentary sovereignty.

The consideration of the Financial Transaction Tax fundamentally demonstrated that the governing helm with those deeply intricate interrelationships had been disturbed and this experience had impacted upon the unsettling of parliamentary sovereignty. The scope of judicial decision-making widens into the sphere of Commons/legislative and executive decision-making at the recognised helm when the ECJ is able to dismiss, as it did, the arguments of the Crown-in-Parliament in its attempts to block the tax on financial trades, and despite a UK veto at the EU level in the legislative process. It is crucial to acknowledge the Commons-consenting-of indirect taxation between the precedented, historical convention of the mixed constitution in the sixth of the eight historical constitutional forms as relevant to parliamentary sovereignty's historical meaning. Where EU membership results in broadening the scope of executive decision-making powers relative to the sphere of legislative consent-providing powers, it unsettles and dilutes the claims of that historical precedent. The historical constitutional form of Montesquieu's (1748) 'power checks power' constitution in which the executive and the two branches of the legislature act as checks on one another becomes anachronistic in its operation.

It is relevant to acknowledge the upholding of the ultimate rule of parliamentary sovereignty itself was dependent upon an acknowledged consensus on tax sovereignty between Government and Parliament – consistent with Hart and Goldsworthy (1999) – and even at the EU-level within the different institutional parts. Yet, through political contestation, the subsequent impasse in which the Government has not yet realised the policy it had set out, or to have reformed or blocked it in the EU legislative process, and having further lost their legal challenge, amplified the fracturing of Commons' and executive relations. That process drove the policy into the deeply contentious political debate and the UK Government's proposed referendum and high-level renegotiation with other member states – providing for Bogdanor's partial separation of powers. The European Parliament's specific competition at the recognised helm directly undermines the representative capacity of the Commons' – the Commons, shorn of its representative roots, in the eyes of pressure groups, is less trusted than the European parliamentary and court system for giving them the tax/right they desired. Furthermore, the growth of administrative powers threatens to unbalance the legislative as against heightened

executive, tax-collecting powers, as the basis of mixed government, particularly where EU-sanctioned bodies realise their potential through a newly developed, original, and not Westminster-delegated authority. The historical constitutional form of Burke – that the sovereignty of Parliament is located in a balanced constitution configured around a trust between the Crown and Parliament (Craig, 2012; Bourke, 1999) – now incorporates the EU as a new steering hand into the broader helm of state.

The subsequent chapter (Chapter 5) will argue that Parliament has become practically less sovereign because the UK's recognised helm has had European Parliament-level parliamentary representation competing over it, not for individual interests, but over its capacity to collectively represent its electors. In the sixth constitutional form, the ultimate rule required balance against its political conditions, including collective representation, to support the rule. On the other hand, the European Parliament exemplifies a high level of specialist 'functional' representation, a shared neo-corporatist emphasis with the central EU institutions, a reliance on 'constitutionalisation' as a means to strengthen its representative linkages and a role of party and management of political partisanship. The case study of the Working Time Directive presents a UK recognised helm which has had European Parliament-level parliamentary representation competing in its capacity to collectively represent its electors. That inter-parliamentary competition produces an unsettling of the historically precedented capacity to collectively represent the electorate as strongly embedded within previous historical constitutional forms, thereby diluting the strength of parliamentary sovereignty.

Chapter 5: Parliamentary sovereignty, collective representation and EU membership

Parliament ought to remain sovereign on the historically precedented basis that the ‘collective representation’ of the UK electorate through the Westminster Parliament provides a deeper connect than the specialist interest representation pursued by the European Parliament. Under EU membership, the UK Parliament has however become practically less sovereign, in part, because the UK’s helm of state has had European Parliament-level parliamentary representation competing over it, not for individual interests, but over its capacity to collectively represent its electors. That the UK Parliament has become less sovereign due to the distorting of its capacity to collectively represent is consistent with the well-recorded observations that the European Parliament exemplifies a high level of specialist ‘functional’ representation. Functional representation provides “instruments of linkage” between citizens and the European Parliament through lobbying channels to organise interest groups and social movements in order to influence EU policy-making (Berkhout et al., 2017; Marsh and Norris, 1997, p. 158). In Strasbourg, the proposed boundaries to representation are defined through neo-corporatist approaches whereby social dialogue between key institutions and social partners is ingrained – it is not primarily defined around majority-supported manifesto(s) turned into elected government agendas. Yet, as a whole it holds virtually no equivalent connect with the domestic electorate in a similar fashion to the national parliaments; the Westminster parliament operates ‘nearer the people’. The same contrast cannot be made of the devolved assemblies whose territorial location and means of representation is closer to their electorate, albeit only on policy areas agreed to by Westminster.

Conceptually, the ‘collective representation’ of the people defines a Westminster model of representation characterised by both a ‘trustee’ representative status (in contrast to a delegate status) of its elected Members of Parliament and a collective parliamentary status by which Parliament acts in the common, national interest so that, as Edmund Burke argued, it “... is a deliberative assembly of one nation, with one interest, that of the whole” (Burke, 1774).

The historical constitutional forms, as precedents, present an English constitution in which governing at the helm is presented as politically contingent upon parliament’s capacity to collectively represent its electors. It is notable that the features of political representation are to an extent described in all the historical forms explaining parliamentary sovereignty, although not effectively achieved until the full electoral

franchise was established in 1928 giving women electoral equality with men, and further to 18 year-olds in 1969 throughout the seventh constitutional form. However, in the form of representation identified in the sixth historical constitutional form, for Burke, there is a sense of recognition of defining a collectively representative Parliament through mixed government in the eighteenth century (Craig, 2012; Bourke, 1999), which is central. The status of sovereignty as it was stated in the eighteenth century reflected the 1688/89 settlement, the 1707 Union and the rivalling of popular sovereignty with Parliament's sovereignty. In that precedent, the ultimate rule of 'What the Crown-*in-mixed* constitutional Parliament enacts is law' (1690-1790s) required balance against its political conditions, including collective parliamentary representation, to support the rule.

The case study of the Working Time Directive demonstrates that the recognised helm has had European Parliament-level parliamentary representation competing in its capacity to collectively represent its electors. In the UK context, political decisions are usually taken by politicians as accountable representatives, not judges or by other bodies, simply because they are electable as representatives and removable at the ballot box and are accountable to Parliament throughout their tenure and ultimately to their electors. The inter-parliamentary competition with the European Parliament, however, produces an unsettling of Parliament's historically precedented capacity to collectively represent its electors as strongly embedded within precedented political historical constitutional forms, thereby diluting the strength of parliamentary sovereignty. The European Parliament is strongly reliant on the Council, Commission and the European Economic and Social Committee's shared neo-corporatist emphasis because it seeks to represent the approach taken by the shared central institutions. In the example of the Working Time Directive, this chapter will also look at the general reliance on 'constitutionalisation', as an attempt to construct constitutional texts defining EU-level individual rights by the European Parliament, in order to strengthen its representative linkages. Yet, here, a clear place can also be found for party and management of political partisanship in explaining the outcome of the Directive. The feature of representation of the collective interest is primary in defining political representation and its impact on parliamentary sovereignty.

The collective representation of the people has an inherent place in the historical development of the British constitution. The UK public currently elects 650 Members of Parliament to *represent* their interests and concerns in the House of Commons. By collectively representing the electorate, MPs consider and propose new laws, and can scrutinise government policies by asking ministers questions about current issues either in the Commons Chamber or in Committees (UK Parliament, 2014). The Government cannot make new laws or raise new taxes without Parliament's agreement. The political party that wins the most seats at a General Election takes charge of the Government for five years, until the next General Election. The Government are therefore the people from political parties that voters' have elected to represent them in order to run the country. The leader of the winning party is appointed as Prime Minister and chooses other party members to work in the Government with them – as Cabinet ministers and junior ministers. Parliament is there to represent voters' interests and make sure they are taken into account by the Government.

The features of representation are to an extent described in most of the previous historical constitutional forms explaining parliamentary sovereignty. However, the form of representation identified in the sixth historical constitutional form in which there is a recognition of 'What the Crown-*in-mixed* constitutional Parliament enacts is law' (1690-1790s) is central. The ultimate rule described above required balance against its political conditions, including collective representation, to support the rule. It is in that explanatory historical constitutional form that the political theory of Edmund Burke has been and remains useful in contemporary understandings of representation – albeit Burke is writing for a pre-democratic age, at least 150 years before Britain establishes the full extension of the franchise. Even with Burke writing in a pre-democratic age, in his view, the English, or Westminster model of representation is characterised by Members of Parliament being elected to the House of Commons with a 'trustee' representative status (as opposed to being directly delegated) by voters and a collective parliamentary status acting in the national interest in that it "is a deliberative assembly of one nation, with one interest, that of the whole" (Burke, 1774). In his now infamous 'Speech to the Electors of Bristol' of 3 November 1774, Burke conveys his understanding of the trustee nature of a representative in which he opposed "authoritative instructions" or "mandates issued" by constituents, "which the member is bound blindly and implicitly to obey, to vote, and to argue for," as

they are “contrary to the clearest conviction of his judgement and conscience”. Therefore, on the definition of the Parliament itself, he argues it –

“... is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member indeed; but when you have chosen him, he is not member of Bristol, but he is a member of parliament.” (Burke, 1774)

The speech conveys at once both that the representative occupies a ‘trustee’ status (as opposed to a delegate status) and that Parliament itself occupies an institutional status of “... a deliberative assembly of one nation, with one interest, that of the whole.” (Burke, 1774) That depth of understanding between voter and representative is even more greatly pronounced in a Letter from Burke to Sir Hercules Langrishe in 1792, in which he describes a notion of “Virtual representation” (Burke, 1792). It is described as

“... that [process] in which there is a communion of interests and a sympathy in feelings and desires between those who act in the name of any description of people and the people in whose name they act ...” (Burke, 1792).

He maintains that such representation “corrects the irregularities in the literal representation”, by reinforcing “common interest and common sentiment” (Burke, 1792). Burke was again re-stating the primacy of common interest in the act of representing.

In this context, Burke saw political parties as strongly mediating between executive authority and parliament, having defined a political party in his ‘Thoughts on the Cause of the Present Discontents’ of 1770 as

“... a body of men united on public principle, which could act as a constitutional link between king and parliament, providing consistency and strength in administration, or principled criticism in opposition” (Burke, 1770, pp. 431-32).

But the ordering of precedents is visible: there is first an institution with Members who can represent its electors as trustees in as their collective interest, followed secondly, by the governing party in the House of Commons governing consistently with that interest. The governing party would then be held to account for having discharged that interest at a subsequent election.

Parliamentary sovereignty and contemporary collective representation by Parliament

It is necessary to question the contemporary relationship between parliamentary sovereignty and the parliamentary collective representation model. Some contrast needs to be found to the underlying features of the popular sovereignty approach (Bogdanor, 2009a) or a traditional party government model (Dalton et al., 2011; Sartori, 2005; Adams, 2001; Schmitt and Thomassen, 1999; Dahl, 1998). Those approaches tend to partially distort that connection and never wholly explain parliamentary sovereignty and its relationship to collective representation, particularly as impacted upon by the development of a European Parliament. The direct 'popular sovereignty' representation model (Bogdanor, 2009a) often misconstrues the relationship between electors and trustees while marginalising the role of parties in Parliament. The party representation model (e.g. Dalton et al., 2011; Adams, 2001), above all, overlooks the prime precedent of MPs who represent as trustees in the collective interest and therefore of electors, as not simply being represented by party.

The introduction of European level parliamentary representation has meant that UK citizens as EU citizens are able to vote directly for MEPs as their elected representatives in the EU. Electors elect MEPs under a proportional representation system, under a regional list system with seats allocated to parties in proportion to their share of the vote; whereas under the Westminster system, they vote under a First-past-the-post system to elect MPs to the House of Commons by constituency, putting a cross next to their preferred candidate on a ballot paper and the candidate with the most votes is elected to represent the constituency. The job of the MEPs is to represent voter interests and those of their city or region in Europe. There are 73 UK MEPs in the European Parliament. They are elected by voters in Great Britain and Northern Ireland, while other EU member states elect MEPs from their own respective countries. Elections take place every five years. For this purpose, the UK is now divided into twelve electoral regions made up of the nations and regions of the UK. Each region has between three and ten MEPs: Eastern - 7, East Midlands - 5, London - 8, North East - 3, North West - 8, South East - 10, South West - 6, West Midlands - 7, Yorkshire and Humber - 6, Wales - 4, Scotland - 6, Northern Ireland - 3. The Members of the European Parliament sit in political groups which are not organised by nationality, but by political affiliation. There are currently 8 political groups in the European Parliament.

In employing the term political ‘representation’, Hanna Pitkin (1967) provides one of the most straightforward and traditional definitions used throughout studies of political representation in the social and political sciences. For Pitkin, to represent is simply to “make present again” (Pitkin, 1967, p. 8). On this basis, political representation is the activity of making citizens’ voices, opinions, and perspectives “present” by political actors speaking, advocating, symbolizing, and acting on their behalf in the public policy making process (Pitkin, 1967). As Rehfeld persuasively argues, “political representation is not had for its own sake” and is created through a set of institutions for a very particular function (Rehfeld, 2005, p. 148). In the Westminster model, elected representatives as MPs, support messages strongly affiliated to a core party philosophy (in practice, the Party Whip), although there remains room for individual manoeuvrability on party-political issues (e.g. Pettit, 2009). The governing party in power inside Parliament is able to provide a legislative program as a self-policing corporate body (Pettit, 2009, p. 85). The Westminster model of political representation – which includes the processes of authorisation and accountability through institutions – conveys the manner in which elected representatives collectively stand for the represented in the corporate body of parliament, with an agenda defined by the party in power (Pettit, 2009). Political representation is deeply institutionalised under the Westminster model because those elected party representatives who form the legislature do so in the national interest and then form the government (and its opposition) in pursuit of the broader, collective interest.

The challenge of popular sovereignty approaches to representation

From a ‘popular sovereignty’ perspective presented by Vernon Bogdanor (2009a), the modern theory of a popular constitutional state directly seeks to affirm the primacy of electors as delegating their representatives in the representation process at the expense of the doctrine of parliamentary sovereignty.

Firstly, for Bogdanor (2009a), on the British model, those who enjoy the right to make political decisions are empowered to do so by virtue of the representative mandate they have received from the electorate. Yet, this can rightly be contrasted, with the EU’s highest constitutional principle whereby the separation of powers reflected between its central institutions (Council of Ministers, the Commission, the Court of Justice and the European Parliament) and also in the division of power between the EU and the member states, marginalises that direct, unitary representative capacity (Bogdanor, 2009a). While

that argument is certainly valid, it is not clear on Bogdanor's argument what the reasons are for the distribution of EU level executive authority impacting upon the weakening of a legislature's right or ability to represent its electors. Many EU countries themselves have widely distributed constitutional separation of powers and executive machinery without that impacting upon the representative roles of their legislatures.

Second, for Bogdanor, the House of Commons is an executive-sustaining parliament, whereas the European Parliament, by contrast, operates by sustaining a dialogue with other Community institutions (Bogdanor, 2009a). However, it might also be considered that the central EU institutions are, to a degree, political actors, not least because of their overarching commitment to enhanced European integration, if not, federalism. That is to argue, and contrary to Bogdanor, the European Parliament as a neo-corporatist body can in practice help sustain both its Commission as well as supporting an inter-institutional dialogue. The European Parliament, in particular, has sought parity with the Council particularly through co-legislating with the Council (Bux, 2017; Hix and Høyland, 2013, p. 172) and a greater fusion with the political powers of the central institutions. It is the European Parliament's approach to 'functional representation' through its being a collaborative chamber representing the mandates, political interaction and views of the other EU institutions (e.g. Jarman, 2011) and through dialogue with social partners that characterised its strength. Given its historical development as a collaborative, legitimising feature of an executive, administrative body, it cannot seek a national-style 'collective representation' of an EU-electorate.

Yet, at the same time, the European Parliament's position of functional representation (Marsh and Norris, 1997, p. 158) has not only moved the British constitutional model away from its instincts in a collective representative model, previously shoring up parliamentary sovereignty, but even further removed it from a delegated model in which electors seek a direct connection with decision-making bodies. Bogdanor asserts a top-down parliamentary sovereignty system derived from the past as being inconsistent with the social and political pressures of modern politics, which promote a greater degree of popular power (Bogdanor, 2009b); yet, Britain's experience of the EC representative institutions suggests an even greater removal of electors from parliamentary decision-makers (let alone direct decision-making), not a design which incorporates them.

Third, for Bogdanor, the Commons is fundamentally a debating chamber dominated by the binary dialogue between government and opposition. EU legislation does not conform to that binary pattern of politics, and there is no party-supported government

in the European Parliament seeking to promote its legislation or secure support for its policies (Bogdanor, 2009a). However, Westminster's binary pattern of politics in which government and opposition battle over policy need not be considered as completely incompatible with the European Parliament-style of consensual political representation. Thomassen (1999) and several theorists have argued that the more formal introduction of a party government model for Strasbourg would help to politicise the relationship between the European Parliament and the Commission and create a pattern of government and opposition within Parliament (Thomassen, 1999, p. 236). Voters would then reward or punish parties for supporting or opposing the Commission. However, for Bogdanor, in contrast to Westminster, the European Parliament as it currently exists is a consensual, working legislature. That assumption sits uneasily with the observation that politics inside the European Parliament is broadly dominated by political parties. In the European Parliament, political groups dominate the agenda (and selection of key positions and forming alliances), while imposing some degree of party discipline (Hix, 2016), albeit European party umbrella groups could not be said to have mirrored national party discipline (Marsh and Norris, 1997, p. 155).

Fourth, for Bogdanor, the European Parliament is a multiparty parliament, operating through carefully constructed coalitions, a kind of "Coalitional politics of this kind" which "is largely unfamiliar to British politicians." (Bogdanor, 2009a) Of course, on this point, it might be observed that Britain has since adapted to recent coalition's and confidence arrangements in which parties, by agreement, prop up others in government. That means that the supposed binary approach that characterises Westminster, however, is not strictly precise – the binary political scheme is resistant to the idea of an overarching primacy of collective representation of the electorate at Westminster. Political representation is presupposed by a prime national legislature able to practically represent as an institution (Rehfeld, 2005, p. 36) and the legislature representing the common interest 'in respect to' its national electors (Rehfeld, 2005, p. 149). There is no real justification to establishing a national representative legislature without reference to a broader "good of all, whatever the good of all may turn out to entail." (Rehfeld, 2005, p. 149). The direct 'popular sovereignty' representation misconstrues the broader relationship between electors and trustees while marginalising the role of parties.

The drift toward a popular British constitutional state, toward popular sovereignty as contrasted with parliamentary sovereignty, and toward electors delegating 'mandated' representatives (as opposed to collectively entrusting them), does not materialise in any major form under EU membership. Parliament and political parties are increasingly

relevant. The suggestions of a drift away from parliamentary sovereignty and towards a popular sovereignty model under EU membership seem unevidenced. The impact of the EU's separation of powers on domestic representation by itself need not have a substantial impact. The claim that Westminster is an executive-sustaining parliament while the European Parliament is a consensual one, fails to recognise the part-federal objectives of the EU institutions, including the European Parliament, which sustains the Commission's policies. Westminster operates on a binary government-opposition style; but the European Parliament, though consensual, does also occupy some aspects of a binary politics, competing to some degree over the Westminster model of representation and sovereignty.

The challenge of the traditional party government model

Since political parties are a feature of both Westminster and European Parliament representative systems, a brief consideration is necessary of the traditional party government model, emphasising the role of political parties in political representation (Sartori, 2005; Dahl, 1998). Dalton et al. (2011) have described the assumptions by which British and European political representation is dominated by parties in a political system where representatives acted as trustees, strongly mediated by political parties (Dalton et al., 2011, pp. 22-3). It is an approach to political representation relevant to a parliamentary system with strong political parties. Parties rather than candidates are viewed as the main political actors. It is political parties, not individual legislators that are the primary vehicles that articulate citizens' policy beliefs and convert them into public policies (Adams, 2001, p. 3). The party government model therefore examines the congruence, or not, between voters and their selected party. The voters are assumed to be those who support the parties in a nation. Voters' choices of parties then provide them with a method of exercising control over the actions of individual legislators and through these over the affairs of government (Adams, 2001, p. 4). The parties consist of their representatives acting as a collective. It is assumed party members act in unison and that they vote as a bloc in Parliament. It is parties that exercise control over the government agenda and policy-making process in Parliament. When voters choose parties they are given indirect control over the actions of legislators and affairs of government. The model strongly suggests that to the extent that competing parties present divergent, stable policies and citizens use these policies as the basis for their voting decisions, parties provide effective vehicles for representing the electorate's political beliefs (Adams, 2001, p. 5). In empirical studies,

broad congruence is found between the Left-Right socio-economic position of the median voters and the Left-Right position of the governing parties (Dalton et al., 2011, p. 23).

‘Party’ occupies an essential and powerful mediating role in the development of the Westminster system, but as with Bogdanor’s delegating-voter, it need only be considered secondary to the exercise of powers in the British constitution. The traditional party government representation model, above all, overlooks the prime precedent of Members who represent as trustees in the collective interest and therefore electors as not simply being represented by party. Nonetheless, the centrality of party is demonstrated by the House of Commons’ own guide to all members of the public entitled, ‘You and Your MP’ (UK Parliament, 2013). The guide specifies to the general public – that is, to voters of all political parties and none – that:

“At times a constituent’s demands may conflict with party policy and your MP will have to decide where their first loyalty should lie. The MP may decide that a majority of constituents would support the party policy – after all that is likely to be one of the reasons why they elected him or her” (UK Parliament, 2013, p. 2).

The collective representation of the electorate, reinforced by the process of election and through an institution which has primacy among the others, provides the framework of political parties. It returns political parties to the central nature of political representation, which is presupposed by a prime national legislature able to practically represent as an institution (Rehfeld, 2005, p. 36) and the legislature representing the common interest in respect to national electors (Rehfeld, 2005, p. 149).

The British constitution (in Burke’s eyes) primarily incorporates party to enmesh the link between executive power and the legislature. The party government model is therefore mostly feasible for the powerful emphasis it places on a political party representative as trustee in the policy- and law-making process, of articulating voters’ political beliefs and their conversion into official public policy or legislation. Mair and Thomassen (2010) acknowledge the absence of party in explaining collective representation in the context of the EU when they argue:

“In effect, Parliament within this model of party government loses the capacity to function in the way that Edmund Burke once favoured: ‘The virtue, spirit and essence of a House of Commons consists in its being the express image of the feelings of the nation.’” (Mair and Thomassen, 2010, p. 31).

The political analysis offered by Burke of a collective-style, virtual representation has often been overlooked when interpreting the European Parliament.

To some degree, however, it is far more complicated to analyse the system of representation employed by the EU using the party government model (Schmitt and Thomassen, 1999, p. 16). The model is said to be “highly problematic when applied to the context of the European Union” (Marsh and Norris, 1997). The European Parliament has no experience of collective representation of a European-wide electorate but it has a weak form of electoral representation and a strong form of functional representation through EU-level, neo-corporatist partnerships. Marsh and Norris (1997) argue that ‘functional representation’ creates alternative linkages between citizens and the European Parliament. This form of representation enables lobbying channels to organise interest groups and social movements for them to influence EU policy-making (Berkhout et al., 2017; Marsh and Norris, 1997, p. 158). The different forms of political representation such as functional representation are “insufficiently, strongly developed” in the European Parliament (Marsh and Norris, 1997), yet it is central to identify that those alternative instruments of linkage exist and that they underpin representation. The role of major groups, particularly economic groupings, is formally recognized and particularly through the European Economic and Social Committee. Elected MEPs can often see their role as spokespersons for trade union groups, farming and small business groups. Pluralist theories have emphasised that interest groups therefore provide another linkage between citizens and the EU, by being represented in pursuit of this functional method. In Strasbourg, the proposed boundaries to representation are defined through neo-corporatist policy whereby social dialogue between key institutions and social partners is ingrained and its purposes are less defined through election, because it is not structured around majority-supported manifesto(s) turned into elected government agendas.

The electorate can influence the Union both indirectly through the choice of parties in national elections and directly through elections to the European Parliament (Marsh and Norris, 1997, p. 154). European elections tend to be fought by national political parties often mainly on national issues and voters make their choice on the basis of their opinions on national issues (Weiler, 1999, p. 266) – or to reward or punish the governing party (Hix and Marsh, 2007). Consequently, it might be argued, EU elections fail as an instrument of democracy at the European level – they fail to link policy preferences of “the European people” to the decision-making process in the European Parliament (Costello et al., 2012, p. 1229). European elections are often viewed as second-order national elections (Nugent,

2010, p. 192). In theory, the party government model might claim to work effectively in the European Parliament on the basis that:

- (i) cohesive and unified parties within the European Parliament need to offer alternative policy programmes;
- (ii) the electorate needs to choose parties based on performance;
- (iii) the outcome of elections link voters' preferences with a policy making process in the European Parliament.

But, those conditions are often faced with a confusing reality in which European party groups are loosely co-ordinated umbrella organisations with lesser party discipline than nationally (Marsh and Norris, 1997, p. 155). In the European Parliament, for example, three dimensions are found necessary to describe the policy attitudes of voters and candidates: an economic left/right dimension, a cultural dimension capturing attitudes towards a broad range of social issues, and a dimension capturing attitudes towards the EU (Costello et al., 2012, p. 1245). Importantly, "the parties and MEPs within Parliament do seem to serve an effective representative role, with the congruence between the European electorate and Parliament being much more pronounced than is generally credited" (Mair and Thomassen, 2010, p. 33). Voting on left-right lines has been increasingly common in the European Parliament, with ideological grounds being central to votes through 'grand coalition' alliances (Nugent, 2010, p. 198; Hix et al., 2007). It is, at best, a partial model of European Parliament representation but which explains only one facet of distinct representation pursued by the European Parliament; in Westminster, the party government model might be seen as much more central to its almost singular mode of electoral representation.

Parliamentary sovereignty and contemporary collective representation by Parliament under EU membership: the case of the Working Time Directive

The Working Time Directive provides an illustration that the recognised helm has had European Parliament-level functional representation joined with it, not for representation of individual interests in Westminster, but for Parliament's capacity to collectively represent its electorate. That competition produces a distortion of the historically preceded capacity of Parliament to collectively represent its electors as strongly embedded within domestic political conventions, thereby unsettling the strength of parliamentary sovereignty.

What is the Working Time Directive and what does it mean for the individual? The Directive has been designed to protect workers' health and safety and that working hours must meet minimum standards applicable throughout the EU, including the UK. The EU's latest Working Time Directive (2003/88/EC) requires EU countries to guarantee rights for all workers, including:

- a limit to weekly working hours, which must not exceed 48 hours on average, including any overtime;
- a minimum daily rest period of 11 consecutive hours in every 24 and a rest break during working hours if the worker is on duty for longer than 6 hours;
- a minimum weekly rest period of 24 uninterrupted hours for each 7-day period, in addition to the 11 hours' daily rest;
- paid annual leave of at least 4 weeks per year; extra protection for night work, e.g. average working hours must not exceed 8 hours per 24-hour period;
- night workers must not perform heavy or dangerous work for longer than 8 hours in any 24-hour period;
- night workers have the right to free health assessments and, under certain circumstances, to transfer to day work and;
- special rules on working hours for workers in a limited number of sectors, including doctors in training, offshore workers, sea fishing workers and people working in urban passenger transport (European Commission, 2015).

There is an individual 'opt out' in which individuals can opt out of the 48-hour week under specified conditions. The Working Time Regulations (1998) implement the European Working Time Directive in UK law. Before that point, rights on hours of work and the right to time off were agreed in individual job contracts (Adnett and Hardy, 2001, p. 119).

The impact of the Working Time Directive upon the UK's social and employment law and the UK constitution

The actions and decisions of the European Parliament put it at the centre of drafting the Working Time Directive as it currently exists. The creation of the Working Time Directive rested on the European Parliament's Committee on Women's Rights and Gender Equality Resolution in March 1989 (European Parliament, 1989a), key events in November 1989, its passing a number of Resolutions relating to the draft Community Charter of

Fundamental Social Rights (Hantrais, 2017; European Parliament, 1989b, 1989c, 1989d), its introducing the requirement of four weeks' annual leave in its first reading in February 1991 (European Parliament, 1991) and developing a common position on the Directive being approved by the European Parliament in October 1993 (European Parliament, 1993). That presentation of where power sat in relation to representatives came at considerable expense to the severely weakened approaches of UK ministers attending the Council and the authority of politicians in Westminster itself.

On a practical level, the Working Time Directive provided legislation for the organisation and reduction in working time in the UK and all EU member states. Before that point, the Conservative Government had historically resisted what it viewed as inflexible and burdensome labour and social laws being imposed on business (Lourie, 1996). Legislation designed to protect young people's, children's and, women's hours began to be introduced at the beginning of the nineteenth century in response to hugely concerning conditions prevailing in factories and mines on top of the extremely long hours worked in factories, mines and shops (Lourie, 1996, Annex 2).

It is notable however both that there have been very few UK legislative restrictions on the hours of work of adult males (Adnett and Hardy, 2001) and that many of those historical legal restrictions, except those affecting children under school leaving age and those on drivers' and pilots' hours, had then been repealed (Rogowski, 2015; Lourie, 1996). On employment law, it is worth bearing in mind the partisanship of the dominant Governing party-in-Parliament remains a determining factor. Throughout the 1980s, the mainstream Conservative Party argued that such legal working time controls were outdated or reduce the flexibility and competitiveness of UK business (Rogowski, 2015, p. 236) while the then mainstream Labour Party asserted the protection of the worker's 'working time' workplace rights as essential to safeguard their labour and interests against big business and vested interests.

Westminster's collective representation versus neo-corporatist, functional representation

The European Parliament itself, while providing some democratic legitimisation for making laws and policies under its own remit, cannot claim to 'collectively represent' its own domestic electorate as it does not classically compete as a formal Parliament with Westminster in that sense. While there is no direct conflict in European Parliament-Westminster 'collective representation' of electors – because the European Parliament does

not operate with that form of representation – the European Parliament pursued a form of functional representation (Marsh and Norris, 1997, p. 158) which impacted upon Westminster’s concept of collective representation.

An exemplary resolution by the European Parliament’s Committee on Employment and Social Affairs in November 1983 on a Commission proposal for a recommendation on the reduction of working time conveys that its neo-corporatist approach relied upon the European Parliament, Council, Commission and the European Economic and Social Committee’s shared emphasis on a proposal (European Parliament, 1983). The neo-corporatist emphasis in the early resolution is clear from its uncomfortable statement of “having regard to the clashes between the social partners as to the effect of a reduction in working time on employment and the costs of a reduction of working time” (European Parliament, 1983). The European Parliament’s fundamental commitment to partnership at Community level action is such that it “... stresses that the lack of agreement between the social partners at European level must not result in collective-agreement initiatives in the member states which are geared to Community aims being delayed or blocked” (European Parliament, 1983). There was, however, a stalling process because the Council had been forced to acknowledge in 1984 that it was unable to reach unanimous agreement with the UK on the proposal. The ministers acting for the Government had vetoed the measure as being uncondusive to improving employment (Rogowski, 2015; Stothers and Porter, 2011).

Again, however, the European Parliament demonstrated its cooperative, neo-corporatist approach and determination, for example, in September 1984, when the Socialist Group’s European Parliament Resolution called on the Council to “make a prompt and positive response” to all the European Parliament resolutions passed urging a reduction in working time (European Parliament, 1984). By emphasising social partnership, it called on the Commission to support all trade union and management initiatives likely to provide industries and regions with approaches to the reduction of working time (European Parliament, 1984). The resolution requested that the nine governments who had previously expressed their support in the council for “working time” proposals of the Commission and European Parliament “should implement these proposals” e.g. irrespective of the UK. The resolution itself was sent to the Council, the Commission, the member state governments, the Union Industries of the European Community (UNICE) and the European Trade Union Confederation (ETUC).

So, in 1988, given the UK’s ongoing resistance, an alternative path had to be found by the European Parliament’s Committee on Employment and Social Affairs and other

institutions and pro-Working Time Directive member states to proceed as they agreed and thereby circumvent the UK veto. In the meantime, the European Economic and Social Committee, Commission and Parliament, by partnership and collaboration, between 1988 and 1989, produced and passed a draft Community Charter of Fundamental Social Rights (Hantrais, 2017; Lourie, 1996; European Parliament, 1989a; European Parliament, 1989b; European Parliament, 1989c). The European Parliament notably sought to strengthen it and remove national controls over the draft. In December 1989, it was passed as a “solemn declaration” by the member states with the exception of the UK (Lourie, 1996; European Parliament, 1989b). Fundamentally, the Commission produced an action programme to implement the Directive and the European Parliament urged for the legislation to be created by the end of 1990. The European Economic and Social Committee and Parliament partnership, again, strengthened the proposals, for example, to ensure 4 weeks annual leave (European Parliament, 1989a; European Parliament, 1989b; European Parliament, 1989c; European Parliament, 1989d). The Directive was delayed in the Council for some time and the European Parliament passed an amended and strengthened version in October 1993 (European Parliament, 1993). It was adopted in the Council on 23 November 1993 (as Council Directive 93/104/EC), where the UK controversially abstained in the vote.

In urging proposals for working time in its 1983 Resolution (European Parliament, 1983), the European Parliament’s Committee on Employment and Social Affairs is evidently reliant on the Council, Commission and the European Economic and Social Committee’s shared neo-corporatist emphasis because it seeks to represent the approach taken by the shared central institutions. It is also concerned only with binding, supranational commitment, not watered-down national promises, on working time. The entire rationale for its frustrations at the dialogue and agreement having broken down between collaborative social partners, as described in the 1983 Resolution (European Parliament, 1983) is because of the European Parliament’s reliance on neo-corporatism and mode of functional representation which occurs through social dialogue and inter-institutional agreement, rather than direct representation of electors. The attempts to save its alternative linkages of representation beyond the citizen-representative link were being frustrated.

The character of the contemporary European Parliament reflects those neo-corporatist and collaborative practices. It is the only institution which is directly elected, with MEPs selected by UK voters and from all EU states voters every five years. The institution seats 751 MEPs – including 73 from the UK – and has gained broad powers

through the Treaties (Shackleton, 2012). It is one of the EU's main law-making institutions, along with the Council of the EU. In legislative terms, today's European Parliament takes part in the three-stage ordinary legislative procedure with the Council of Ministers on an equal status with it, as "co-legislature", in order to legislate (Bux, 2017; European Union, 2014; Hix and Høyland, 2013, p. 172; European Scrutiny Committee, 2013; Shackleton, 2012, p. 137; see Bradley and Ewing, 2010, p. 122). The field of policies covered by the ordinary legislative procedure has since increased under the Lisbon Treaty, providing the European Parliament with further powers to influence the content of certain laws. UK voters elect MEPs to an institution only on the basis that is recognised as an institution in the recognised helm having the main role of debating and passing European laws, with the Council, as well as scrutinising other EU institutions, particularly the Commission, to make sure they are working democratically (European Union, 2014). In terms of legislation passed by the EU impacting upon the UK, the EU determines more than 50 per cent of its legislation (on that proportion, see Geddes, 2013, p. 7; Miller, 2010; Lord Triesman, 2006), through non-UK, EU representative/ legislative bodies of the European Parliament with its own directly elected representatives in addition to other EU institutions. It is still national parliaments, rather than the European Parliament directly that guarantees democratic principles are respected and that the importance of national parliaments playing "a central role in the European institutional system is thus the *condition sine qua non* of democracy" in Europe (Neyer, 2014, p. 125). Irrespective of the European Parliament's direct election under a system of proportional representation, it is reported to suffer generally from a 'democratic deficit'.

Following the early UK veto over working time proposals, the hardened 1984 Socialist Group's European Parliament Resolution sought even greater representation through social dialogue between the Commission and trade union and management initiatives (European Parliament, 1984). It urged that degree of inter-institutional agreement to the extent that the other nine pro-working time member states should proceed without the UK. The Resolution requested that their European Parliament view be sent to the major European trade union bodies. The allied work with the European Economic and Social Committee in strengthening the proposals in the early 1990s and the urging for the Commission to stronger relations with social partners to produce working time law in the 1989 European Parliament resolution is further evidence of representation through social dialogue with partners plus inter-institutional agreements. The European Economic and Social Committee is part of the neo-corporate institutional means of representation in the sense that it is a "consultative body" that closely cooperates with the European Parliament

(as well as the Council and the European Commission) by the representation of the views of Europe's major socio-occupational interest, workers and employers groups and others (European Economic and Social Committee, 2016). The deeply ingrained nature of representation through social dialogue is reflected very well in one of the European Parliament's major amendments to the Working Time Directive in February 1991, on first reading, which demanded that the member states themselves adopt measures to ensure agreements on working time between social partners would be legally binding (European Parliament, 1991). When it comes to social partners, the EU comfortably absorbs national social partnerships with employer and workers organisations into its own social dialogue in a way that Westminster partly rejected. This difference produces a competitive distortion of the domestic legislature as a primary political actor able to collectively represent its constituents on social and employment interests.

Whereas the UK's (Conservative) governing party-in-Parliament as the representative self-policing 'corporate body' – collectively standing for the represented in that corporate body of parliament through an agenda defined by party (Pettit, 2009, p. 85) – had previously been the space for resolving contested labour laws, the acceptance and irreversibility of the imposed EU policy, then law, demonstrated the unaccountability of ministers at Westminster in making laws and policies in the national interest. It shifted the space for resolving deeply contested labour laws into a wider domestic situation taking place in the UK by the mid-1990s: a strong desire to change the UK's governing party-in-Parliament. Given the impasse at the European level, the UK's governing New Labour Party in 1997 as pledged in the General Election, signed up to the Social Chapter and subsequent legislation such as the Working Time Directive (Hantrais, 2017; Lourie, 1998). It did not address the impasse as such, but through its acceptance brought a small degree of political settlement and EU-UK policy consistency, despite the ongoing practical failures in implementing the legislation since that date.

European Parliament representation on the other hand is exemplified by a second-order collaborative legislature set up as a politically representative institution (while unable to represent a unified European interest). It represents, as a neo-corporatist body, the approaches of other central institutions and its social partners while only weakly representing its electors. The existence of multi-representation government as described in practices, and part-federal representative government as described in the Treaties, however, make the party government model both useful and relevant. Elective and professional interest 'functional' representation in the European Parliament works by creating 'instruments of linkage' (Marsh and Norris, 1997, p. 158) as opposed to operating

through Westminster's 'collective representation'. Collective representation by MPs of their electors is defined strongly by their political parties, when in Government, remaining accountable to parliament and through regular elections to the electorate, who retain ultimate decision-making capacities. It is sovereignty-affecting at Westminster because collective representation allows the governing party to be a self-policing 'corporate body', collectively standing for the represented in that corporate body of parliament through an agenda defined by party (Pettit, 2009, p. 85). Collective representation is straightforwardly distorted at Westminster when representatives of the governing domestic political parties become less accountable to parliament because those parties' policies are bypassed by the policymaking of the European Parliament. Under EU membership, the UK Parliament has become practically less sovereign because the UK's helm of state has had European Parliament-level parliamentary representation competing with it – not as a competing delegation of representatives – but in relation to its 'trustee' capacity to collectively represent its electors through the governing political party.

Supranationalist representation

The ongoing and repetitive statements by the European Parliament in its Resolutions to ensuring a supranational commitment to working time reduction, as distinct from weaker, non-binding national pledges, served to remind the Commission to strengthen its binding requirements at the supranational level. It also is a reminder that the Commission and European Parliament are vital supranational elements - the Commission as government, the European Parliament as representative parliament - within the multi-representational, federal architecture. The 1983 Resolution is heavily critical of the Commission's proposal at this stage for not sufficiently ingraining the law at the Community level. It positively warns off collective agreement initiatives in member states (European Parliament, 1983). The 1984 Resolution pressing for the nine member states to take up the working time proposals of the Commission and European Parliament (European Parliament, 1984), irrespective of the UK, is again supranational in its objective. The subsequent manoeuvre in the late 1980s in utilizing the draft Community Charter is an attempt to create one of a number of constitutional documents for government at the European level. The step of adopting the Working Time Directive under Article 118a (Lourie, 1996), thereby relying on a qualified majority rather than unanimity in the Council (Rogowski, 2015, p. 236), affirms the supranational decision-making procedure as essential to making genuine

‘European decisions’. It is that exercise of supranational decision-making by a supranational institution seeking to bring about a request in law at a supranational level, as well as the presentation of the Treaties (Article 118a) which achieved a sidestepping of the consent of the UK through qualified majority voting (Martinsen and Wessel, 2014, p. 14). The process marginalised and bypassed the understanding that politics is defined through a representative legislature able to govern consistently with its function being Burke’s common interest, or Rehfeld’s “good of all” (Rehfeld, 2005, p. 149). The essence of supranational decision-making in this way is that the EU, with procedural approval from its parliamentary institution, competitively distorts the domestic legislature’s ability to make decisions as a primary political actor consistent with collective representation in the electorate’s interest.

Representation through constitutionalisation

Representation can also occur at the EU-level by reference to ‘constitutionalisation’ as a means to strengthen its representative linkages. It is of relevance in the broader ‘constitutionalisation’ process that in late 1989, the European Parliament’s Committee on Employment and Social Affairs and Committee on Women’s Rights had pushed for the Community Charter of the Fundamental Social Rights of Workers alongside measures for the reorganization of working time (Hantrais, 2017; Adnett and Hardy, 2001, p. 115; European Parliament, 1989b, 1989c). During that process, in November 1989, the European Parliament adopted the text of a powerful resolution on the Community Charter of Fundamental Social Rights convinced that the adoption by the Council of that Charter “constitutes a first step towards the establishment of fundamental social rights in the European Community ...” (European Parliament, 1989b). Nevertheless, it criticised the draft as a “watering down”, “inadequate”, “imprecise” not least because of “the repeated references to ‘national legislation’ and ‘national practices... which must on no account be allowed to weaken the fundamental nature of the rights set out in the Charter.” (European Parliament, 1989b). The resolution expressed references to the opinion of the European Economic and Social Committee earlier that year on fundamental Community social rights and the Declaration on Fundamental Rights and Freedoms adopted earlier that year. The resolution is supportive of the International Labour Organisation conventions in making those claims. Another separate European Parliament resolution, again, passed on the same day on the attainment of economic and social cohesion lays bare the European

Parliament's frustration at the Council's inability to provide worker's rights through a constitutional source – they were “not satisfied merely with a solemn declaration by the Council on the basic social rights of workers” (European Parliament, 1989d). That Charter was signed by all Heads of Government of the member states of the European Community except the UK at Strasbourg in December 1989 (Adnett and Hardy, 2001, p. 115; Lourie, 1996).

The European Parliament commitment to a form of representation through social partnership and constitutionalisation, in spite of UK resistance to the measure, was further demonstrated in the European Parliament's Committee on Employment and Social Affairs resolution of September 1990, relating to the Commission's impending action programme on the implementation of the Charter for 1991-1992 and working time (European Parliament, 1990). The Commission itself had submitted its proposal for a Draft Directive concerning certain aspects of the Organisation of Working Time to the Council of Ministers in September 1990 (Lourie, 1996). The European Parliament resolution pushed for the Commission to submit to the Council by 31 December 1991 proposals in its legislative programme, along with tighter changes made by the European Parliament with a view to adoption of the legislation by 1 January 1993 (European Parliament, 1990). Then, the Commission submitted a proposal for a Draft Directive concerning certain aspects of the Organisation of Working Time to the Council of Ministers in September 1990. The UK Conservative government objected to that Directive from the beginning (Rogowski, 2015), arguing that it would impose burdens on employers, interfere in the relations between employers and employees, while reducing competitiveness and flexibility (Rogowski, 2015, p. 236; see Bolick, 1995). It was not seen as necessary on the grounds of health and safety (Lourie, 1998, p. 19; Lourie, 1996). It was only when the proposal for a Council working time directive came before the European Parliament in February 1991 for first reading that it was approved with 39 amendments (European Parliament, 1991). One amendment (no. 2) called upon the Community to at least respect certain Conventions of the International Labour Organization (ILO) in seeking working time reduction. The European Parliament approved the Commission proposal subject to Parliament's amendments at that first reading.

The most unexpected facet of representation at the European level in the example of the Working Time Directive is its general reliance on ‘constitutionalisation’ as a means to strengthen its representative linkages. The constitutional sources of the EU Treaties, notably through the Single European Act, the draft Community Charter (which became the Social Chapter), the International Labour Organisation (ILO) Conventions (e.g. Adnett and

Hardy, 2001, p. 120), the Declaration of Fundamental Rights and Freedoms, the November 1996 ECJ judgement against the UK and ECJ case law provided consolidated and clarified, written expressions of rights which supported the overall objective of reducing working time. That political turned constitutional project is at odds with the Westminster system, with its partly written but wholly uncodified constitution. In both a 1989 Resolution and on the above first reading of the Directive in 1991, the European Parliament is reliant on the ILO Conventions – setting out the principles of international labour law – in seeking a reduction of working time, which as well as helping to consolidate the European Community standard is, by its nature, a strong international (not merely European Community) standard. It is already well documented that the European Economic and Social Committee and European Parliament have repeatedly called on the Commission to draw on ILO standards in formulating social policy (Rönnmar, 2011, p. 41; see Adnett and Hardy, 2001, p. 120). The Westminster system has historically rejected extensive, written rights-based documents – including many ILO Conventions – as a source of governing law and political schemes.

The UK Government, after all, rejected the Community Charter, did not participate in several ILO Conventions and took the Commission to the ECJ over the Working Time Directive law (Adnett and Hardy, 2001). It is notable after the 1988 period the Charter and other ‘fundamental rights’ expressions provided significant weight in relation to the European Parliament’s representative authority in order to support legislation for the reorganisation of working time (see Hantrais, 2017). At that early point, the European Parliament had little reputation, credibility or recognition as a legitimate legislature able to represent the views or sentiments of its electors, even though it perhaps did not necessarily require it. When it came to constitutionalisation as a tool of representation, the EU offers citizens texts and documents with material, claimable rights as authoritative guidance. This creates a competitive distortion of the domestic legislature as a primary political actor able to collectively represent the collective interest in the absence of constraining, inflexible, written, rights-based, authoritative guidance.

Competitive partisanship and party government

Westminster’s capacity to collectively represent an electorate is competitively distorted in the face of EU-level multi-representational government. The competitive, partisanship demonstrated at both the Westminster and Strasbourg levels is meaningful to the outcome

and implementation of the Working Time Directive. Within the political cultures generally, just as the socialist approach to a social Europe in the vision of Jacques Delors hardened the UK Conservative government's stance on social and labour law, so too did Thatcher's free market stance harden the European Parliament's political resolve to create a Community-wide labour code (Dimitrakopoulos, 2013). The partisanship created a fluidity of political culture which in Strasbourg was generally supportive of Working Time Directive and labour market regulation, irrespective of domestic support or opposition in member states.

This observation on bi-party partisanship in political culture is an important point of evaluation because in attempting to characterise EU and Westminster representation in the context of the Working Time Directive, it is central that in Westminster, a national Conservative administration had been elected for the duration of the 1979-1997 period. It viewed itself as 'deregulatory' and seeking reductions in the burdens of inflexible social and employment legislation imposed on business (Adnett and Hardy, 2001; Bolick, 1995). It rejected the notion of 'social Europe' – and by extension the legislative binds of working time legislation, which during the 1980s Margaret Thatcher strongly resisted. The Conservative government notably maintained an opt-out on the Social Chapter on the Maastricht Treaty (Gowland et al., 2010, p. 103). The domestic Labour Party, while weakened, Eurosceptic and in opposition, opposed the Conservatives on all those policies. On the other hand, the European Parliament as a whole, contained a much greater number of pro-working time socialist MEPs in its political grouping throughout the European Parliament elections of 1984, 1989 and 1994. The British Labour Party and the political left in Europe, along with its strong sub-national relationship with the trade union movement on the whole favoured and mostly campaigned for strengthening social and employment law, the vision of a social Europe and along with it, the Working Time Directive. In Strasbourg, the Socialists were therefore the largest majority groupings in the first four elected European Parliament's (1979-99) and the centre left has held the majority for the duration of this period (Hix et al, 2003, p. 315). This is important to bear in mind even where there is cooperation with the European Parliament. That entire period responsible for the creation of the Working Time Directive contrasts with a domestic, deregulatory Conservative administration from 1979 to 1990 under the premiership of Margaret Thatcher, then from 1990 to 1997 under John Major. It was following events under the Major government that the UK took the Commission to the ECJ and lost that it was required to implement the Directive (*UK v Council of the European Union* [1996]; Lourie, 1998). It followed in Tony Blair's, post-1997 newly elected Labour administration

that the UK then opted into EU social legislation and introduced the regulations in 1998 (Rogowski, 2015; Barysch, 2013). This partisanship impacts upon the respective legislatures, enabling them to harden in the recognition of their representative strength. In particular, the significant and hardened role played by the socialist grouping in the European Parliament played – through the Progressive Alliance of Socialists and Democrats (S&D) combined with the European People’s Party (EPP) in helping to produce the EU working time legislation – can be contrasted with the resistance exerted by a national, majority Conservative administration in Westminster.

The bi-partisanship was again more widely illustrated to the public at large in the ongoing battles between the UK Prime Minister Margaret Thatcher, a Conservative free-marketeer, and the then EU Commission President, a socialist, Jacques Delors over that Charter. When, in 1989, Delors presented a Charter of Fundamental Social Rights, the reason it was adopted by all member states except the UK had been that Thatcher opposed it on the grounds that it would restrict free enterprise (Raileanu-Szeles, 2013, p. 34; Adnett and Hardy, 2001, p. 115). Even when the Charter was finally attached to the Maastricht Treaty in 1992, known as ‘the Social Chapter’, Britain employed its opt-out under John Major’s government to prevent it becoming part of UK law at that stage (Lourie, 1997).

The UK Government under John Major claimed an opt-out from the Directive. For the UK’s purposes, it made an application for the annulment of the Directive to the ECJ in March 1994 (Lourie, 1996). The ECJ had rejected the UK Government’s challenge to the Directive (Lourie, 1998; *UK v Council of the European Union* [1996]). In sum, the UK had “no option but to obey the law”, as the Government minister was forced to concede (Adnett and Hardy, 2001, p. 120). Directives, as legislative acts, set out the objective that all EU countries must achieve but in which it is up to the individual countries to decide how, by implementing legislation (European Union, 2014). Despite losing its case before the ECJ in 1996, the Conservative Government did not implement the Directive until the adoption of the enforcing Working Time Regulations 1998, which entered into force on 1 October 1998 (Lourie, 1998). This took place under the later New Labour government in 1997, who accepted the Social Protocol to the Maastricht Treaty and also accepted an updated Working Time Directive, which was adopted in November 2003 and brought it into effect (Hantrais, 2017; Dimitrakopoulos, 2013). The European Parliament has continued to be at the forefront of unsuccessful and ongoing attempts to end Britain’s individual opt-out from the Working Time Directive and the UK finally being forced to limit the working week to 48 hours for all employees.

The partisanship in legislating for the Working Time Directive demonstrated at a deeper institutional level how the federal structures of the European Parliament, through electoral and functional representation, however weak, were functioning at the European level. On first interpretation, Bogdanor (2009a) is correct that the European Parliament is not an executive-sustaining parliament where members of the executive are drawn from the voter-elected legislature in similarity to the Westminster model. Yet the European Parliament is an executive-approving parliament – with consultative and advisory powers preceding the Maastricht Treaty – whose opinions and votes issued to members of the governing Commission and Council are driven to conform or amend their behaviour in governing.

Since the European Parliament exists in a complex system of multi-tiered government, its representative capacity exists in a complex multi-representation, part-federal government. Traditional lines of accountability and authority under the Westminster model are diffused and dissipated under the European Parliament model, but nonetheless political party remains relevant to its representative ability. Schmitt and Thomassen (1999, p. 17) argue that the EU is a multi-tiered system of government. It has several layers of European government, each with its own system of political representation. Of course, European government is different from state government based upon a responsibility to a significant majority in parliament. Nor is there a European people whose sovereignty is embodied in the European Parliament. However, as Schmitt and Thomassen (1999) argue, the Treaties (Article 138a TEU) on which the European political institutions are based provide for a system of political representation as expressed in the responsible party model. The Treaties provide the goal to which the Union should aspire, albeit an objective for a federal Europe. That interpretation of the Treaties makes the party government model relevant. As Costello et al. (2012) have argued, while European political parties do not compete for the votes of a European electorate (Costello et al., 2012, p. 1229) and while there is no true European system of political representation, that does not mean European elections cannot provide an “instrument of linkage”. In the European Parliament, parties are instruments of linkage with less power of direction at the recognised helm; in Westminster, parties are both well-established instruments of linkage as well as instruments of direction at the helm.

Claims to sovereignty rest on binary politics conducted through the Westminster system. The performance of EU politics which creates linkages of that binary party politics in a European Parliament therefore undermines the claims to parliamentary sovereignty. The serious difficulty many theorists have in accepting that binary party-based

government-opposition politics has some level of explanation at the European Parliament-level representation is because of its reliance on a theory which explains that European Parliament-level is, at least in part, a parliament incorporated into a European federation. To accept federation is to accept a specific distributed state structure at the European level, which alters the claims to sovereignty in the member states and is not always accepted in the existing research (Moravcsik, 2008; Blankart, 2007; Majone, 2006). Yet, in following Thomassen's reasoning of multi-tiered government and the federal interpretation of the EU by Annett (2010), it should also be understood that European multi-tiered government is indeed part-confederation and part-federation (McCormick, 2015, p. 38; Burgess, 2006), just as those arrangements are part-supranational and part-intergovernmental. When representation is pursued at the European Parliament-level, it can divert to a federal, representation mechanism through political parties, which includes the majority socialist support behind the Working Time Directive. One reason why political groupings first formed in the European Parliament had been the conscious effort to establish a federal form of political organisation in the EU-level institutions (Hix et al., 2003, p. 313). Given that the European Parliament exists in a part-federal structure and where its representation is only poorly and part-elective, it is only true for one part of European Parliament representation. Yet, however minimal, it is essential, albeit unusual, as it is able to reflect the role of a partisan political party belief system in a proto-bicameral, non-majoritarian, consensus-seeking, Strasbourg-setting.

The collective representation of the electorate at Westminster over substantive areas of government policy works effectively when it is elevated beyond the partly elective and strongly functional representation pursued by the European Parliament. There have been some theoretical omissions in recognizing the contemporary relationship between parliamentary sovereignty and the parliamentary collective representation model - particularly in contrast to the popular sovereignty representation approach (Bogdanor, 2009a), or the party government approach which distort that connection - as impacted upon by European Parliament parliamentary representation. Delegate- and party-representation models have importance and utility in relation to parliamentary sovereignty but only in so far as they are presupposed by the primacy of a national legislature (consistent with Rehfeld, 2005, p. 36) able to practically and collectively represent its electorate. That representing is driven toward a collective interest, brought to bear in the Government's majority party inside the House of Commons, with its manifesto-turned-agenda, governing consistently with that interest. The European Parliament can undermine that representation process.

While European Parliament binary politics is not strictly organised through government-opposition parties as in Westminster, the parties are importantly organised into party-based, political-affiliation blocs, where the majority socialist groupings held ideological power over those not in that grouping throughout the 1980s and 1990s and provided their approval or amendment to Commission and Council decisions. The dominance of the the Progressive Alliance of Socialists and Democrats (S&D) in relation to the European People's Party (EPP) in Strasbourg and the relevance of working time to the political culture and vision of the political left on the Left-right dimension strongly aided the European Parliament's representative capacity. That is a challenge to those who view the European Parliament representation as distinct from Westminster or reject any notion of attempted EU federation party-politics as defining representation at the European level. Stable and cohesive political parties in the S&D and EPP groupings do have relevance and binary politics is feasible (consistent with Hix, 2016; Hix et al., 2007) within a part-federal system, in line with the party government model, despite the strength of other forms of representation. The lineage in which parliamentary sovereignty depends on political representation that, in turn, relies on binary party competition is undermined.

Consistent with Mair and Thomassen (2013), competing parties can operate with at least a partially effective representative role in the European Parliament. The acceptance of party and of party-approving parliament is valuable however but only in so far as it is a second-order, collaborative legislature unable to represent a unified European interest in respect to a European electorate. On the other hand, Westminster's capacity to collectively represent had been dis-empowered when the governing Conservative Party became less accountable to Parliament – given its pledges to veto and prevent the Directive from coming into action in the UK – because the party's policy was bypassed by the policy-making of the European Parliament. The bypassing of Parliament in this manner strongly indicates the reverse of Bogdanor's (2009a) assumption, that EU representation affirms the popular power of British voters, for they and their direct and indirect pathways to representation are minimised. The exception to the rule in the creation of the Working Time Directive might be domestic, minority opposition groups and broad trade union movement on the political left who, in resisting Thatcher domestically, viewed working time legislation as a universal, European-wide solution to their campaign to improve national working conditions. The European Parliament representation process competitively distorts the domestic legislature as a primary political actor able to collectively represent its constituents because the governing party in the House of

Commons, which is charged with producing laws and policies is so radically bypassed by Strasbourg policy-making.

Conclusion

The Working Time Directive provides a very useful illustration, and often for unexpected reasons, that the UK's helm of state has had European Parliament-level functional representation competing with its capacity to collectively represent its electors. That competition produces an unsettling of the historically precedented capacity to collectively represent its electors as strongly embedded within historical constitutional forms, thereby diluting the strength of parliamentary sovereignty. The Directive provides a presentation of where power sat in relation to representatives, which came at considerable expense to the severely weakened approaches of UK ministers and the authority of politicians in Westminster itself. In urging proposals for working time, it is notable that the European Parliament was strongly reliant on the Council, Commission and the European Economic and Social Committee's shared neo-corporatist emphasis because it seeks to represent the approach taken by the shared central institutions. The European Parliament had been eager to ensure a supranational commitment to working time reduction, as distinct from weaker, non-binding national pledges, which served to remind the Commission to strengthen its binding requirements at the supranational level. It had also been a reminder that the Commission and European Parliament are vital supranational elements - the Commission as government, the European Parliament as representative parliament - within the multi-representational, federal architecture. The most unexpected facet of representation at the European level in the example of the Working Time Directive is its general reliance on 'constitutionalisation' as a means to strengthen its representative linkages. Yet, here, a clear place can be found for party and management of political partisanship in explaining the outcome of the Directive. Westminster's capacity to collectively represent had been disempowered when the governing Conservative Party became less accountable to Parliament – given its pledges to veto and prevent the Directive from coming into action in the UK – because the party's policy was bypassed by the policy-making of the European Parliament. The bypassing of Parliament in this manner puts EU-level representation at odds with both parliamentary and popular sovereignty models, for voters' direct and indirect pathways to representation are minimised.

Finally, whereas the UK's (Conservative) governing party-in-Parliament as the representative self-policing corporate body (Pettit, 2009) had previously been the space for resolving contested labour laws, the acceptance and the irreversibility, of the imposed EU policy, then law, demonstrated the unaccountability of ministers at Westminster in making laws and policies in the collective interest. As Rehfeld (2005, p. 149) argues, separately, the collective national good is primary in defining the function of political representation. This chapter, however, has not sought to deal with the shift in the European Parliament's powers from consultation, to cooperation, to co-decision throughout the early European Community, the Single European Act and then the Maastricht Treaty, respectively (Bux, 2017; Hix and Høyland, 2013, p. 172), but that shift in powers has a significant relevance to the role of European Parliament in producing legislation. While extended political representation mechanisms have arguably led to more accessible representative institutions in Westminster and Europe, as Westminster is fused ever-closer into EU-level representation – whilst also being morphed into federal, devolved, sub-national and regional bodies domestically – it has ultimately led to the distortion of the domestic legislature as a primary political actor able to collectively represent its constituents.

The subsequent chapter (Chapter 6) explains that Parliament is effectively less sovereign because the recognised helm has had EU-level fundamental rights schemes incorporated into it. In that process, EU fundamental rights schemes protected by the courts become constitutionally elevated, entrenched in codes of written and legal form. That can be contrasted with the historical precedents of Bracton (in the first historical constitutional form) presenting an English constitution in which governing at the helm is presented as legally distinct but politically contingent upon its capacity to determine and respect fundamental rights. Contemporary EU rights are alternatively expressed as unchallengeable instruments above politics – complete with EU legal supremacy, direct effect and ECJ jurisdiction – relative to the precedent and minimalist protection afforded by Parliament. The case study of the EU free movement right makes evident that the UK governing helm of state has had EU rights incorporated into its constitution through a dependency upon EU-level rights. The submission of the domestic legislature to the courts, along with a final binding effect upon the executive, impacts upon and unsettles parliamentary sovereignty.

Chapter 6: Parliamentary sovereignty, the EU free movement of persons and the precedent of fundamental rights provision

Parliament has been theoretically sovereign because, in part, it rests on the historically precedented basis in which the provision of fundamental rights is made through recourse to political, parliamentary mechanisms rather than the subordinate provision offered by the courts. Under EU membership, the UK Parliament has however become practically less sovereign because the UK's helm of state has had EU-level fundamental rights schemes incorporated into it. In that process, EU fundamental rights schemes protected by the courts become constitutionally elevated and entrenched in codes of written and legal form. As such, rights are expressed as unchallengeable instruments above politics – complete with EU legal supremacy, direct effect and ECJ jurisdiction – relative to the precedented and minimalist provision afforded by Parliament. The submission of the domestic legislature in that key respect to the courts, along with a final binding effect upon the executive, impacts upon and dilutes the strength of parliamentary sovereignty.

What are those fundamental rights presently claimed to be? Within the expanding scope of human rights, 'fundamental rights' describes rights which are claimed to be of greater or particular significance which cannot be derogated from. The term "human rights" is used in international law arenas; whereas rights guaranteed by constitutions at the national level are most often referred to as "fundamental rights". In some interpretations, both can often be referring to the same substance. Contemporary rights are categorised as fundamental when they guarantee that no one living in a free democratic society such as the UK should be free to forego (Bingham, 2010). Those rights have included:

- the right to life;
- the right that no one shall be subject to torture or to inhuman or degrading treatment or punishment;
- the right that no one shall be held in slavery or perform forced labour;
- the right to security and liberty of the person;
- the right to a fair trial;
- the right not to be punished without the law;
- the right to respect for private and family life;
- the right to freedom of thought, conscience and religion;
- the right to freedom of expression;
- the right to freedom of association;
- the right to marry;

- the right to protection of property, and;
- the right to education.

It is held that those rights must be secured without discrimination on grounds of sex, religion, race, colour, language, political opinion, national or social origin (Bingham, 2010, pp. 10-36). Domestically, systems for the provision of fundamental rights present a challenge and constraint upon the authority of decision-makers – it therefore becomes the function of the system as a whole to ensure that decisions made on behalf of the general interest do not neglect or deny individual rights (Muir, 2014, p. 29). There is however no universal consensus on fundamental rights, even among developed countries (Bingham, 2010, p. 68).

The first historical constitutional form presents an English constitution in which governing at the helm is presented as legally distinct but politically contingent upon its capacity to determine and respect fundamental rights. The law and the law-making sovereign were “mutually conditioned”, contingent, reciprocal and interdependent at the helm, even though the sovereign retained the power to govern the realm (Kantorowicz, 1957, pp. 153, 155). In contrast, this chapter considers how the modern neo-Diceyan view of the British constitution *disregards* that contingency (Dicey, 1964), the radical common law constitutionalism school (Allan, 2013) *overstates* it and; the constitutional state perspective (Bogdanor, 2009a) *overlooks* that contingent relationship. Those interpretations of the British constitution have misplaced EU fundamental rights in a political and constitutional context, if not underestimated their supremacy to European Convention- and international-rights. This chapter addresses those oversights through appealing to the ‘political constitutionalism’ of Jeremy Waldron (1999), Richard Bellamy (2007) and Adam Tomkins (2013). It asserts the primacy of political legitimacy over constitutional entrenchment and challenges the contemporary narrow determination of rights by courts in favour of a shared responsibility by the executive, the legislature and judiciary. It challenges the approach of supranational legalism in determining EU rights through the prism of democratic parliamentary majorities.

The case study of the EU free movement right demonstrates that the UK governing helm of state has had EU rights incorporated into its constitution through a dependency upon EU-level rights by individuals in the UK, as EU citizens, in order to protect their interests to move freely. It leads to the elevation of the UK judiciary as a rights-adjudicating court system as it fuses ever-closer into the Luxembourg court system. This has meant the dilution of the UK Parliament as a rights-providing institution. The deep

political claims made to the constitutional and institutional entrenchment of the rights themselves, irrespective of political legitimacy, combined with the disappearing consensus between the arms of state and community in protecting rights has progressed this continued legislative decline and judicial advance in the UK, impacting indirectly upon the unsettling of parliamentary sovereignty.

Parliamentary sovereignty and historical fundamental rights provision

Fundamental rights have a unique but reflexive role in the historical development of the British constitution, in which the development of modern British-EU citizens as rights-bearing individuals developed from Royal subjects with very basic rights granted by royal privilege through to British subjects of Empire with limited, implicit privilege-determined rights, then UK citizens with limited statutory rights determined by the state, to UK citizens enjoying a greater, wide bundle of rights as EU citizens. Although Dicey in his seminal 1885 work, 'An Introduction to the Study of Law of the Constitution', accepted such key principles and rules as "the conventions of the Constitution" which regulate relationships (Russell, 1987, p. 545), he subverted them as non-legal additions to the constitution. Dicey's work embodied the subordination of court-based fundamental rights provision in Parliament's role in the sense that no higher, fundamental right framework was required where freedom was protected by common law custom and Parliament checked the unwieldiness of the executive (Bradley and Ewing, 2010, p. 397; Francis and Morrow, 1994, p. 23). The relevance of that view has been lost in contemporary Britain. At that time, national citizens equipped with material rights which they could read from a constitution or charter was simply notprecedented. As Royal subjects, their British nationality developed from an allegiance to the Crown owed by them in return for which the Crown had no power to expel them from the realm (Bradley and Ewing, 2010, p. 418). People born within the Crown's dominions became a subject. The major common law division was between British subjects and aliens (foreigners). It was only in the later part of the twentieth century in post-imperial Britain that Parliament wrote national subjecthood and immigration into parliamentary law – the Immigration Act 1971 and the British Nationality Act of 1981 – with the former drawing on the deep division between European Community and non-European Community freedom of movement rights (Bradley and Ewing, 2010). EU citizenship then adopted a formal legal status in the Maastricht Treaty of 1993.

The Maastricht Treaty (Treaty on European Union) itself then explicitly included the right to move and reside freely in member states (subject to limitations and conditions) under the concept of EU citizenship, along with a number of associated rights. So, the principle of free movement was significantly incorporated through the Maastricht Treaty as a core part of the concept of 'EU citizenship' (Marzocchi, 2017). The European Commission says it is the right most closely associated with EU citizenship (Peter, 2014). The Treaty formally created the European Union and formalised the recognition of the status of EU citizens with their associated rights, as claimable for every national of a member state. EU citizenship offers significant potential for the provision of fundamental rights (van den Brink, 2012). The principle has itself evolved as a definition over time from the right to free movement for workers, or those economically active in the EU labour market, to then apply also to job-seekers, the self-employed, students and the self-sufficient e.g. retired persons. Under the Treaties, the free movement of persons is an area of 'shared competence' so that where the EU has enacted legislation, the UK does not have competence to act other than in accordance with that legislation.

The subsequent EU treaties including Amsterdam (1999), Nice (2003) and Lisbon (2009) have entrenched EU citizenship as a bundle of rights built around 'free movement' and 'non-discrimination' between and across EU member states (Isin and Saward, 2013, p. 1). The development of modern British-EU citizens as rights-bearing individuals developed from Royal subjects with very basic rights granted by royal privilege (medieval), to British subjects during Empire with limited, implicit privilege-determined rights, to UK citizens with limited statutory rights determined by the state, to UK citizens enjoying a greater, wide bundle of rights as EU citizens which have been determined by the EU as assented to by UK and 27 other European governments.

The character of parliamentary sovereignty has been historically dependent upon Parliament respecting the customs of fundamental law. It is notable that the historical development of the sovereignty invested in Parliament is legally separate but politically contingent upon the development of fundamental law/rights provision. It is that first episodic historical constitutional form within a historically evolving approach of eight potential historical forms that demonstrated that the development of parliamentary sovereignty was dependent upon respecting the customs of fundamental law. That interpretation of Bracton leads to the understanding of sovereignty as government through the helm of the ship of state, which can be understood from the vantage point of the period of medieval kingship in the centuries preceding the Reformation in the thirteenth and

fourteenth centuries. The important relationship is that baronial counsel reinforced the moral – albeit, not legal – duty of fundamental law that the Crown was now subject to and must respect. That historical form responds to an interpretation of Bracton’s medieval constitutionalism in which law and the law-making sovereign at the ‘helm’ of the medieval state, were “mutually conditioned and contingent even though the sovereign retained the power to govern the realm (Kantorowicz, 1957, p. 153). The governing at the helm of the state is then, both legally separate but politically contingent upon the capacity to respect fundamental law and rights.

Parliamentary sovereignty and contemporary fundamental rights provision

In understanding the contemporary relationship between UK parliamentary sovereignty and fundamental rights, there are ample contrasts to be made to the underlying features of the neo-Diceyan view, a radical common law constitutionalism or a constitutional state perspective – which undermine that connection and never wholly explain parliamentary sovereignty and its relationship to fundamental rights, as impacted upon by EU membership. In a neo-Diceyan political landscape, contemporary Britain does require a fundamental rights framework of some sort – which Dicey himself saw as unnecessary (Francis and Morrow, 1994, p. 23) – and one of the major developments which has led to a framework being incorporated into the UK is through the rights introduced to UK citizens, as EU citizens. The historical precedents of Bracton present a British constitution in which governing at the helm is presented as legally distinct but politically contingent upon its capacity to determine and respect fundamental rights. This chapter appeals to the ‘political constitutionalism’, as the politics of rights, preferring to examine the primacy of politics over institutional rights entrenchment in relation to parliamentary sovereignty.

Most notably, the introduction of ‘EU citizenship’ through the EU Treaties means that UK citizens as EU citizens are able to appeal to directly enforceable modern EU fundamental rights, as against rights previously determined through a national constitutional structure. They are material rights, not ancient privileges. Citizens generally have to appeal to courts, not Parliament in claiming those rights. Neither can Parliament redefine those rights or in any way abridge them. The process to realise an EU or national right which is claimable is through a legal and judicial process, not a political or parliamentary process, and the process of determining, maintaining and protecting rights is

gradually becoming a matter for the courts, not Parliament. They are claimable as entrenched tools of entitlement but they are not tools strictly subject to political or parliamentary decision-making as consented to by the political community. That argument identifies with the political constitutionalism of Jeremy Waldron (1999), Richard Bellamy (2007) and Adam Tomkins (2013), who have each convincingly addressed how judgements about decisions, including rights, cannot be legitimately entrenched or handled by judicial or technical bodies that are isolated from accountable and democratic processes. The argument that EU fundamental rights have impacted upon UK parliamentary sovereignty only partially rests upon the changing nature of the individual as a Crown's subject which has been altered. This occurred partly through the UK's own national legislation in the 1970s and 1980s, including the Immigration Act 1971 and the British Nationality Act 1981. What was more notable, however, after the Maastricht Treaty was the morphing of UK subjecthood into that of EU citizen. This is a fundamental feature, but by itself, has only a limited explanatory power. The move to EU citizenship explains the shift in the individual's access to a system of rights which were almost exclusively an expression of parliamentary-determined privileges towards access to a system of immediately codified, court-determined entitlements. It partially explains the displacement of an individual's allegiance to Crown-determined-rights to a citizen's legal obligations within a broad, contractual set of rights, or material/text-based constitution. It also in part explains the shift from obligation to 'a nation' as a political entity toward the rights of a citizen in relation to their state. But it is absent in explaining how a political community provides the legitimacy for any potential constitutional entrenchment of certain rights – EU, international or otherwise – and how the consensus between officials in the arms of the state determines the impact of EU fundamental rights upon parliamentary sovereignty.

Constitutional state theory and the entrenchment of codified rights

In the existing research, the 'constitutional statist' perspective is incompatible with recognising the contemporary connection between parliamentary sovereignty and fundamental rights. Part of the incompatibility arises from *overlooking* the historical precedent describing parliamentary sovereignty as enabling Parliament to politically determine fundamental law and rights. The constitutional state perspective assumes instead that the *entrenchment* of written, codified, fundamental rights trumps their parliamentary legitimacy and sovereignty. Vernon Bogdanor (2009a, p. 57) in his central argument in *The*

New British Constitution, argues that the post-2007 era of constitutional reform, together with Britain's entry in 1973 into the European Communities, has had the effect of replacing one constitution – that is the UK's Diceyan doctrine of parliamentary sovereignty and its comparatively weaker provision of fundamental rights among European Community members – with a new constitution. The main elements of the new constitution include stronger provisions afforded to fundamental rights in the UK and a part of which is already due to separate non-EU rights under the Human Rights Act as well as EU-derived rights enabled under the European Communities Act.

The Human Rights Act itself is supposedly the cornerstone of the new constitution. He suggests those reforms strengthened the idea of Britain adopting a written or codified constitution and the potentiality for a popular constitutional state (Bogdanor, 2009a, pp. i-xiii). It is further claimed that judges fear and act on the basis that Parliament and government cannot be trusted in several circumstances to refrain from passing legislation inconsistent with fundamental rights (Bogdanor, 2012). It is not verifiable however that the emergence of a popular constitutional state, based on those multiplicity of features, including the development of EU-level and European Convention on Human Rights-level fundamental rights, is evident now or even potentially in the future. The old constitution, he theorises, was based on the sovereignty of Parliament; the new constitution is based on a constitutional state with a stronger provision of human rights (Bogdanor, 2009a, pp. i-xiii, 87). That proposition does not sit well with the observation that despite the Human Rights Act, there remains a well-evidenced lack of human rights culture in the UK (Ziegler et al., 2015).

In later research, Bogdanor overlooks the relevance of fundamental rights to the making of parliamentary sovereignty by almost singularly describing parliamentary sovereignty as being limited by the European Communities Act 1972 (Bogdanor, 2012). He claims the Act altered the rule of recognition – meaning that Parliament cannot derogate from European Community law. Because national courts have to apply European Community law where inconsistent with national law, the European Communities Act limits Parliament's substantive power (Bogdanor, 2012, pp. 184-6; Goldsworthy, 2012; Bogdanor, 2009a). For Bogdanor, the rule of law embodied by fundamental rights is superseding the rule of recognition (Bogdanor, 2009a, p. 74). In describing that bolstering of rights under the rule of law, Bogdanor recognises but worryingly consigns Hart's rule of recognition to the past, and as being superseded by the rule of law. Furthermore, it has frequently not been the case of accepting either the sovereignty of Parliament or of fundamental rights provision as Bogdanor appears to assume: the UK has simultaneously

experienced both parliamentary sovereignty and a politically, subordinated fundamental rights provision scheme. Part of the assumed segregation arises from overlooking the historical and political medieval precedent of how parliamentary sovereignty, though legally distinct, was made politically contingent upon fundamental law and rights. Bogdanor's theory constructs a tension between parliamentary sovereignty and fundamental rights.

Finally, if one were to accept that there is a development of a UK constitutional state, it seems logical that post- European Communities Act arrangements with EU legal supremacy and ECJ jurisdiction over the UK in the past forty years would have a vastly greater and binding impact on the stronger provisions afforded to fundamental rights through the courts and an undermining of the doctrine of parliamentary sovereignty than those provisions afforded through the Human Rights Act. Bogdanor instead relies on non-EU, European Convention-based rights and obligations under the Human Rights Act as being the cornerstone of the new constitution, when there is no such supremacy afforded by that Act. Parliament's sovereignty is said to be explicitly preserved and the courts are merely obliged to issue a 'declaration of incompatibility'. That reasoning which overstates European Convention rights relative to the impact of EU rights tends to overlook the distinction in constraints between Charter-, Convention- and international- rights. It thereby overlooks the serious constraints imposed on parliamentary sovereignty by EU-level rights.

From Treaty- to Convention- to EU-rights: claimable legal rights preceding parliamentary sovereignty

The UK's historical system of rights ultimately provided by Parliament can be viewed as contrary to the court-provided, legally-claimable rights in the EU political system. One observable contrast is the way in which UK parliamentary sovereignty has been severely diluted by entrenched EU-level rights accorded to EU citizens through the implementation of the EU Charter of Fundamental Rights – in comparison to the partial dilution by partially entrenched European Convention-rights and it being relatively unaffected by international Treaty obligations. Under the Charter, the UK's recognised helm has recently had a written single document defining the fundamental rights protected in the EU incorporated into its constitutional structure (Box 6.1).

Box 6.1: The Charter of Fundamental Rights of the EU

- The Charter of Fundamental Rights of the EU brings together fundamental rights protected in the EU under a single document;
- The Charter contains rights under six headings: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice;
- First announced in 2000, the Charter became legally binding on the EU with the Treaty of Lisbon entering into force in December 2009;
- It entrenches the rights found in the case law of the Court of Justice of the EU;
- It entrenches the rights and freedoms enshrined in the European Convention on Human Rights;
- It entrenches the other rights and principles resulting from the common constitutional traditions of EU countries and other international instruments;
- The provisions of the Charter are relevant to the national authorities only when they are implementing EU law and EU institutions in regard to the principle of subsidiarity;
- Where the Charter does not apply, the protection of fundamental rights is guaranteed under the UK's own system and in other EU countries, under their own constitutions and international conventions.

(European Commission, 2017)

In the past, fundamental rights had been considered a 'peripheral' element of the EU construction (Hrestic, 2014). By incorporating the Charter, a high-level provision provided by the courts is entrenched in codes of written/legal form of a charter in contrast to the historical provisions afforded by Parliament. The Charter is primary EU law. As Koen Lenaerts has observed, "By rendering fundamental rights visible and by merging and systematising in a single document the sources of inspiration scattered in various national and international legal instruments, the Charter marks a new stage in the process of European integration." (Lenaerts, 2012, p. 375). It is enforced by the Court of Justice. At every step, from the EU legislative process to the application of EU law at the national level, the rights and principles of the Charter are taken into account. The right of the free movement of persons, for example, is incorporated into the Charter itself under Article 45(1) which "Every citizen of the Union has the right to move and reside freely within the territory of the member states" (European Commission, 2017). Since 1 December 2009,

when the Treaty of Lisbon entered into force, the EU Charter of Fundamental Rights stands on an equal footing with the EU Treaties.

The UK's historical system of Parliament-provided rights is minimalist compared to the partially protected Convention-rights and fully supreme EU-rights. It has recently been concluded that the Charter is directly effective in the UK with supremacy over inconsistent national law, albeit it does not apply to all areas of national law (European Scrutiny Committee, 2014). It only applies to those areas that fall within the scope of EU law. Whilst existing human rights litigation in the UK most often comes within the framework of the European Convention on Human Rights, the important focus must be on the way in which EU law in 2009 "codified a wide number of human rights, which it calls fundamental rights, in the form of the Charter" (European Scrutiny Committee, 2014). The UK's historical system of Parliament-derived rights is almost completely contrary to the centralised, legally-claimable rights in the EU system. The Charter not only provides an additional source of human rights law, but includes rights not specifically mentioned in the European Convention. This can go beyond the provision afforded by the European Convention and it is set to become a more contemporary and relevant catalogue of rights than the now aged, mid-twentieth century European Convention on Human Rights (Douglas-Scott, 2015, p. 259).

The EU legal framework distinguishes it strongly from other international organisations. By specifically focusing on the constraints imposed on parliamentary sovereignty by EU-level fundamental rights, it ought to be recognised that whereas the courts cannot strike down Acts of Parliament under the Human Rights Act (incorporating the European Convention on Human Rights), EU legislation and fundamental rights have direct legal supremacy for UK/EU citizens. That legal framework is what distinguishes the EU from other international organisations (Nugent, 2010, p. 225). EU rights override inconsistent national legislation and European institutions can politically act in accordance with that legal power. It can be acknowledged, as Bogdanor (2009a) does, the balance between parliamentary sovereignty and European-wide fundamental rights provision, or more generally the rule of law, has become more pertinent, if not controversial, since the Human Rights Act 1998 was passed, incorporating the European Convention on Human Rights.

The European Convention did give individuals the right to complain of breaches of their Convention rights. The Human Rights Act in 1998 then meant it was possible to enforce 'foreign' Convention-rights in the domestic courts i.e. not only in Strasbourg (Bradley and Ewing, 2010, pp. 401-7). In content, there are many similarities between the

EU Charter of Fundamental Rights and the European Convention on Human Rights. Prospective EU members are asked to sign up to the European Convention although there is no explicit request or obligation for current EU members (McHarsky-Todoroff, 2015; Miller, 2014). The Act allowed that subordinate legislation in the UK not compatible with the Convention's fundamental rights could be quashed or disapplied. Primary legislation such as Acts of Parliament which were not compatible with Convention rights remained in force but the High Court would only issue a 'declaration of incompatibility' where ministers would be expected to remedy or make amendments to remedy the Act in order to remove the incompatibility. That can be contrasted to a position in which EU law – directly supreme over UK law – developed into an individual rights-based system and mechanisms such as the "direct effect" of EU law allows individuals to themselves claim EU rights against the member states in an increasingly large number of settings (Muir, 2014, p. 28). Legal supremacy, direct effect and preliminary rulings referring matters to the ECJ all mean judges are obliged as a "powerful check" to give effect to the interpretation of EU law and fundamental rights adopted by the ECJ irrespective of whether a domestic higher court might disagree with this (Muir, 2014, p. 36).

Many of the doctrines of EU law that have posed the greatest challenge for the UK's parliamentary sovereignty are often not to be found in the articles of the Treaties, nor even in European law specifically, but in the case law of the ECJ (Tomkins, 2010). The doctrine of 'direct effect' means that individuals in the UK can bring actions in national courts in order to vindicate rights secured to them under the Treaty or EU legislation (Craig, 2011, p. 122), as against purely domestic rights in the domestic courts. It has the effect of making EU law 'the law of the land' and dramatically increased the number of cases brought by individuals to national courts to defend rights accorded to them under EU law (Hix and Høyland, 2011, p. 84; Weiler, 1991). A treaty provision can have direct effect where a private party can rely upon it against another ('horizontal direct effect') and by a private party against the state ('vertical direct effect') (Hix and Høyland, 2011, p. 84; Bradley and Ewing, 2010, p. 129). The doctrine of legal EU supremacy (*Costa v. ENEL* [1964]), of individuals invoking direct effect in their national courts (*Van Gend en Loos* [1963]), of indirect effect (*Marleasing* [1990]) or of state liability (*Francovich* [1991] and *Factortame* [1990]) or the law relating to the Charter of Fundamental Rights (e.g. the Opinion of the Advocate General in *Zambrano* [2011]) are all examples of those challenges.

However, compare that incorporation of entrenched, directly effective EU fundamental rights and part-entrenched Convention rights into the UK's national constitutional structure with that of other internationally binding rights and obligations. The post-war international law environment required an introduction of a rights regime with new obligations to be imposed on the UK. Yet, international Treaty law has not posed an equivalent challenge or represented a direct constraining effect as supranational EU fundamental rights have on UK parliamentary sovereignty. Lebeck (2007) examines the strict differentiation between public international treaties emphasising relations between governments, rather than relations between individual rights in domestic public law. International human rights are established directly by treaties, whereas EU fundamental rights have been recognised over time through the case law of the EU. Parliament should in theory take into account the UK's obligations in relation to international law when it legislates, but in practice the courts would not hold an Act void on the basis that it conflicts with principles of international law (Bradley and Ewing, 2010, p. 57). Rights agreed to by international Treaties must nevertheless strictly be approved by Parliament if there is to be a change in national law. Although European Community-law emerged from such treaty-law regarded as a part of public international law, it marked a departure from those previous constraints.

Where the EU claims directly effective domestic powers, most international legal orders can only claim decision-making powers that aim to influence decisions in domestic legal orders – but which are not usually directly effective. The rights of both the European Convention on Human Rights as well as European Community-law cannot be understood as merely treaties under public international law, as they both have claimed to have acquired certain constitutional characteristics that distinguish them from other forms of international cooperation and also provided them with a constitutional authority. The European Convention on Human Rights is a constitutional document – but the constitutionalisation of the European Community started with the creation of the ECJ and its statement in case law (particularly, beginning with the case *Costa v. ENEL* [1964]). Those international-level constraints are distinguishable from the Charter and Convention constraints.

Similar to Bogdanor's (2009a) approach in the existing research, a uniquely distinct common law perspective in the radical theory of national common law constitutionalism (Allan, 2013; Alan, 2011) might be viewed as equally problematic. That perspective directly seeks to overstate the primacy of a national common law, court-decided, entrenched fundamental rights architecture at the expense of the doctrine of parliamentary sovereignty (Allan, 2013). The historical constitutional form that the provision of fundamental rights by the courts is subordinate to the political provisions provided by Parliament is incompatible with today's rights-based, court-primacy theories of domestic, radical common law judges and constitutional theorists. The common law argument accepts the supremacy of the judges through EU level fundamental rights and diluting UK-level parliamentary sovereignty. The radical theory of common law constitutionalism seeks to affirm the primacy and sovereignty of a national common law, court-decided, entrenched fundamental rights architecture and a displacement, if not rejection, of the doctrine of parliamentary sovereignty (Gordon, 2015, pp. 126-131). Parliamentary sovereignty is expendable for Allan (2011) because judicial loyalty to EU principles can justify the disapplication of Acts of Parliament inconsistent with EU law. The theory supposes the judiciary would pursue that practice even if that were to qualify the exercise of parliamentary sovereignty (Allan, 2011, p. 162). It offers a theory that parliamentary sovereignty can be diluted by EU fundamental rights. The challenge of common law constitutionalism to parliament as a provider of fundamental rights is best answered by the political constitutionalist model. The reason for this response lays with the very mechanisms through which the people authorise their political and legal representatives and hold them to account which comprise the fundamental rules of the UK constitution and its rights. Such a parliamentary model can still withstand rights review and a 'weak' form of Convention rights-based judicial review, in which a declaration of incompatibility by the appropriate court is possible, providing it is advisory or can be overridden or put to one side by the legislature (Bellamy, 2014).

It is an overstatement to suggest EU fundamental rights are altogether entrenched in relation to rights derived from Parliament. Yet, the EU implication of radical common law constitutionalism has been that the UK constitution has specially "entrenched" EU-level fundamental rights incorporated into it. As Allan (2010) maintains, the 1972 Act meant EU law with its rights "has been entrenched" (Allan, 2010). As entrenched rights, they act as a

substantive limitation upon legislative supremacy, which opens the way to the broader idea that the voluntary European Communities Act substantively and legally limited Parliament. While Allan does mostly allow that the European Communities Act can be expressly repealed if necessary, the Act is said to be subject to a “qualified immunity” to that enjoyed by national, common law fundamental rights, including the Magna Carta and the Bill of Rights 1689. Allan also therefore refers to a “special entrenchment” of European Community law (Allan, 2013, p. 148). Despite those claims to entrenchment of EU rights, there is little to no evidence to suggest that there has been a contemporary change in the rule of recognition itself or the underlying consensual understanding of British state officials that judges still do not have the authority to declare a statute invalid (see Bingham, 2010; Goldsworthy, 1999, p. 253).

Political constitutionalism: a response to constitutional state theory and common law constitutionalism

The argument that EU fundamental rights have weakened UK parliamentary sovereignty rests on the constitutional entrenchment of the rights themselves – but that subsidiary concern itself rests on settling the broader question of their political legitimacy. In order of intensity, the UK system has veered between:

- Centuries of non-entrenched parliament-provided rights.
- Then, over nineteen years of statutorily entrenched European Convention-rights (under the Human Rights Act) but which are enforced by only weak judicial review.
- Then, forty-four years of entrenched directly effective ECJ rights brought in under the European Communities Act and founded on the Luxembourg court’s case law, through to;
- Directly effective entrenched EU rights founded on a constitutional EU Charter of Fundamental Rights since the Lisbon Treaty of 2009 gave full effect to that Charter (Howe, 2013).

The latter marks the height of EU fundamental rights as being constitutionally entrenched. It explains the shift from a UK individual’s access to Parliament-provided rights toward their access to claimable, directly effective rights due to them in a national court. The entrenchment reinforces the supremacy of EU rights – it creates and is an effect of a

system which stabilises the supremacy of EU law. It explains how rights have been displaced from a stage in which rights are parliament-provided to one in which they are partially provided by courts. That also means it helps to explain the move from a consensual system in which rights cause acts to be reviewed by Parliament to an internally antagonistic constitutional system in which rights enable acts to be reviewed in courts. But statements of the ‘entrenchment’ of rights fail to address the ultimate and broader question of political legitimacy of those rights – and the role Parliament plays in providing that legitimacy. Parliament-provided rights cannot become entrenched in this manner because rights are deferred to a forum of contested politics in which rights are pursued as amendable (i.e. subject to politics) and enacted only when there is the necessity to convince a parliamentary majority.

In the existing literature, such recognised problems of overlooking historical precedent carries with it the consequence of the blurring of EU fundamental rights as arising simply from international obligations, or as equivalent to Convention-rights, or of supposing that European Communities Act rights alter the rule of recognition. This has led to a broader emphasis on an entrenched, court-decided rights architecture which has created a bias toward mainstream legal constitutionalist interpretation. The role of institutional politics is considered irrelevant. Fundamental rights are seen as irremovable or entrenched features, above politics. Jeremy Waldron and other political constitutionalists have consistently argued against this weight of scholarship assuming that the rules governing the legal system and the political system should be constitutionally entrenched (Waldron, 1999). The strong degree of EU fundamental right entrenchment does not depend on EU or UK legality, as is often assumed, but on the political legitimacy of rights within the political system. The fast-developing system of rights is progressively framed by ECJ case law (Blauberger and Schmidt, 2017), and not Parliament.

Howe (2013) describes that the EU Charter of Fundamental Rights has directly led to a significant expansion of the scope of matters (not just on fundamental rights) subject to EU law, including:

- Making it unlawful for insurance companies to charge different premiums to customers based on gender, adversely affecting young women drivers who in general have a lower accident rate than young males (*Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011]).
- The Charter becoming applicable when a Court in the UK makes an order involving the disclosure of personal data under the Data Protection Directive

(Supreme Court in *RFU v Consolidated Information Services Ltd (formerly Viagogo Ltd)* [2012]).

- Justifying the expansion of EU law to cover the general procedures by which member states enforce the payment of taxes (*Åklagaren v Hans Åkerberg Fransson* [2013]).

The broadened expansion scope of issues falling under the Charter has led to a diminution of the UK Parliament's role, and a judicialisation of rights which should otherwise be the subject of decision by democratically elected and accountable politicians (Howe, 2013; see also, *Benkharbouche & Anor v Embassy of the Republic of Sudan (Rev 1)* [2015]; *Google Inc v Vidal-Hall & Ors* [2015]). The danger is that rights are increasingly made in the context of practices with poorly developed political legitimacy i.e. by less accountable European courts, European commissioners and appointed ministers at the European Council, which bypass elected representatives in legislatures and direct accountability to the political community.

The difficulties of legitimacy in those decisions can be addressed through an appeal to political constitutionalism – although that does not mean to reject all the rules of legal constitutionalism (see Gee and Webber, 2010, p. 273; Loughlin, 2003). For example, it does not warrant the assumption that Hart's rule of recognition no longer exists, as Bogdanor (2009a) theorises. As Goldoni (2013) summarises, political constitutionalism proposes that:

- decisions about rights are better left to the political and parliamentary process, while;
- judicial reasoning must accept a subordinate role in that respect as well as keeping the government in check and protecting the political process itself (Goldoni, 2013).

Some emphasis must be placed on the analysis of institutions. Parliaments, as political institutions, are capable and better at reasoning and deciding about the content of rights than courts. For that reason, it can be more accurate, as Wilkinson (2013) has already argued, to refer to 'parliamentary' constitutionalism as opposed to 'judicial' constitutionalism.

Politics matters. Fundamental rights, or constitutional rights, should not be considered to be pre-political or above politics, but, instead, ought to be deeply embedded in the political process. It is consistent with Waldron's (1999) political constitutionalism that such fundamental rights are subject to the 'circumstances of politics'. That process involves both the recognition of a plurality of perspectives on common problems which

leads to pervasive disagreement and the recognition of the need to make decisions that address the fact that there is a plurality. Rights are protected but on the basis that they have a constitutive collective dimension, defended as common goods of a political community, rather than individual entitlements. The openness to politics entails the rejection of constitutional entrenchment, as recognised by Bogdanor (2009a) and Allan (2013). However, the arguments for protecting fundamental rights by legal entrenchment pre-empt future political action of the community and other arms of government without providing a solid justification. By removing rights from politics, it attaches only legal significance and views them as politically non-negotiable, irreversible, unamendable and non-reviewable. Constitutional entrenchment alienates rights from their political context and, alongside a strong form of judicial review, fosters a detrimental judicial culture of rights. Political constitutionalism is largely justifiable since the UK reasonably disagrees about the rights (e.g. underpinning the extension of benefits in the welfare state, to social housing, to fertility treatment) because they disagree on the substantive outcomes, or common good, that a society committed to democratic ideals should achieve. The democratic process is more legitimate than the judicial process at resolving these disagreements, and it offers an effective mechanism for upholding the key constitutional goods of individual rights and the rule of law (Bellamy, 2008; Bellamy, 2007; Waldron, 1999). On a practical level, Bellamy and Weale (2015) concede liberal democracies combine different degrees of legal and political constitutionalism. The UK constitution is a reflection of that mix. One defining point where legal constitutionalism meets political constitutionalism is where constitutional entrenchment itself meets political legitimacy. After all, legal entrenchment does not fully explain why the breakdown in inter-institutional comity and political consensus between officials in the arms of state enables EU fundamental rights to dilute parliamentary sovereignty. The shift is explained as the move from a political consensus between the executive, the legislature and the judiciary as being responsible for fundamental rights provision through to the judicial power as being elevated (in contrast to the executive and legislature) and more narrowly responsible for fundamental rights provision.

The shared deferral approach to fundamental rights

EU membership has diluted parliamentary sovereignty by delegitimising fundamental rights provision previously resting on the historically precedented basis that the executive, the legislature and the judiciary enjoyed an official consensus in which they all have a

shared responsibility for that rights provision. Under the traditional Westminster model, a form of official consensus exists between the branches of the state including Parliament in exercising a shared responsibility for that provision. Radical common law constitutionalists and constitutional statist have therefore narrowly and wrongly overemphasised an advance in judicial power as leading and finalising what constitutes rights, which disregards the role of intra-state consensus.

Hunt et al. (2012) criticise the false choice between the legislature and the judiciary. The choice between either one as the guardian of fundamental rights is being misplaced and increasingly rejected. In place of that old dichotomy, they argue there is now a consensus that all branches of the state – including the executive, the legislature and the judiciary – have a shared responsibility for the provision and realisation of fundamental rights. This shared deferral might be reframed to explain that such a consensus is not a new one – it is a neat historical accompaniment to the rule of the recognised helm. Furthermore, while there had long been a consensus behind officials in maintaining the ultimate rule (Goldsworthy, 1999; Hart, 1997), it might be considered there has also been a similar, secondary-level consensus between state and legal officials in which the provision of fundamental rights by the executive, the legislature and the judiciary are to be protected albeit in a subordinate position in relation to the ultimate rule. By acknowledging the role of politics, there is a broader assumption that the law of the legislature (statute) should not be seen as a unitary person with a single will but shared consensus emerging out of a broad plurality of proposals (Waldron, 1999), not to be navigated around.

While theories of the British constitution must understand parliamentary sovereignty relative to the whole constitution, as Allan (2013, p. 23) argues, that does not mean the British constitution must now tend towards the judicial power of the common law courts as characterising what constitutes rights. This has been pursued to the extent that the latter approaches view rights as above politics and in which consensus, inter-relationships and comity between the branches of government and the political community are given insufficient attention. Bogdanor attributes an enhanced dialogue between the judiciary, Parliament and government to the provision of rights through the Human Rights Act (Bogdanor, 2009a, p. 68), but the shared deferral and consensus well predated that 1998 Act. In so doing, Bogdanor (2009a) has tended to disregard the role of that ‘shared responsibility’ or even ‘consensus’. Furthermore, many would argue that the enhanced dialogue for the provision of rights broke down further (and was therefore not enhanced) after the Human Rights Act and other associated legislation and has been in constant decline since the UK’s incorporation into the then European Communities. Neo-Diceyan

thinking pervading mainstream legal constitutionalism also gives the confusing impression that parliamentary sovereignty is on par with the ‘rule of law’ and in which a statement of the relationship with fundamental rights provision is not specified.

The transfer of fundamental rights provision as historically subject to ‘shared deferral’ to a contemporary stage under EU membership where the shared deferral is absent and there is a greater singular deferral to the courts, is a pivotal point. It reflects the change in the meaning and strength of fundamental rights. That Europeanisation process suggests again the reverse of Bogdanor’s popular constitutional statism in contemporary Britain: a more narrowly defined power centred on the court-provided rights in which the relationship with the politics of popular, elected representatives in Parliament is increasingly disassociated from the content of rights. The courts trump Parliament. In that process, following EU membership, a greater, shared deferral of rights-making power (which, for Bogdanor, might be expected under a written constitutional order) is being replaced, or at least weakened with a narrowly-defined rights-making power.

Democratic parliamentary majorities as guarantors of fundamental rights and parliamentary sovereignty

In the existing research, political constitutionalism also remedies the omission of the role of parliamentary majorities in making parliamentary sovereignty contingent upon rights. EU fundamental rights have diluted Parliament’s sovereignty because the subordinate provision of fundamental rights by the courts – which previously posed only minor limits on the will of the Government’s parliamentary majority constituting the ultimate rule, now defies its subordination to the will of that majority. In theory, Parliament is sovereign because it rests on the basis that the provision of fundamental rights by judges is subordinate and poses very few limits on the political will of the Government’s parliamentary majority. It is often identified in the literature that fundamental rights expressed as pre-political features, have the effect of constraining public reasoning and parliamentary settlement and enable a limit on parliamentary majority rule (see Goldoni, 2013). EU fundamental rights provision calls into question, to an “unprecedented extent”, sensitive governmental policy areas through a rights-based process of Europeanization (Muir, 2014). The proposition that the provision of fundamental rights constitutes a primary function of the state, to be exercised within the framework of the constitution,

through the action of its democratically elected Parliament presents an insurmountable problem for common-law and constitutionalist statist theories in general.

It is to be expected that EU fundamental rights have diluted parliamentary sovereignty previously resting on the assumption that legitimate fundamental rights provision is derived from national parliamentary majoritarianism – because parliamentary sovereignty now rests on a weaker assumption in which rights are provided and protected by a non-elected, less accountable supranational legalist architecture. Majoritarianism provides a democratically accountable foundation – legalism does not. Supranational legalism provides a legal, technical, judicial competence for decisions which reinforce an EU-wide legal system – parliamentary majoritarianism does not. As EU rights are enforced by individuals against the actions of their own state, including Acts of Parliament, a democratic question naturally emerges. The laws enacted by Government majorities in national parliaments have become subject to rights interpreted by a supranational court, even where those laws are inconsistent with the constitutional interpretation of parallel rights (see Pérez, 2009, p. 15). A supranational court by its very nature makes legal decisions on a judicial, non-majoritarian basis. The ECJ is therefore a directly non-accountable institution and it belongs to a supranational system of governance in which the introduction of a fundamental rights system at the supranational level has been viewed as one of its greatest achievements (on the latter point, see Fabbrini, 2014, p. 9). Protecting human rights specifically performs a function in the development of a political union at the EU-level and highlights the major role played by the ECJ along with national courts as guarantor of individuals' rights (Egger, 2006, p. 551; Mayoral, 2016).

There is one underlying theme which underpins the role of democratic parliamentary majorities in constituting rights. The exercise of EU fundamental rights represents a shift from majority-backed rights to a position of majority-limited rights. Rights have been displaced from a stage in which rights reflect majoritarian decision-making as determined in parliamentary elections to one in which they are decided by non-elected, judicial or technical bodies, courts or tribunals. The shift from Parliament to legalism in the provision of rights is coupled with the shift from majority-backed rights to the position of majority-limited rights. Pérez (2009) persuasively addresses how judicial review of legislation by the ECJ poses a counter-majoritarian difficulty since the decisions of the body representing the people are struck down by judges lacking public accountability.

Domestically, in the executive, the role of ministers leading Department advisers is then diluted in the recognised helm. Their carefully-devised policies and Government Bills

are drafted in accordance with the provision of EU fundamental rights. Yet those rights were already decided in the ECJ without the consent of the majority in the House of Commons. Through the ECJ pursuing a process of filling in the case law gaps (Blauberger and Schmidt, 2017; Ferraro and Carmona, 2015), the court deprives the ultimate rule of the parliamentary will of the Government-in-Commons majority in significant policy areas in which the provision of fundamental rights by judges is superior to any potential provision offered by the elected majority in the House of Commons.

In contrast to the view that governing at the helm is presented as legally distinct but politically contingent upon its capacity to determine and respect fundamental rights:

- the modern neo-Diceyan (1964) tradition *disregards* that contingency;
- the tradition of the common law constitutionalism school (Allan, 2013) *overstates* the relationship and;
- the constitutional state perspective (Bogdanor, 2009a) *overlooks* that contingent relationship through its appeal to popular sovereignty and the enhanced role of the courts.

Those interpretations of the British constitution have tended to misplace EU fundamental rights in a political and constitutional context, if not underestimated their supremacy to Convention- and international-rights.

Parliamentary sovereignty and contemporary fundamental rights provision under EU membership: the principle and qualification of the free movement of persons

The EU fundamental right of free movement of persons unsettles the UK's own historically subordinate fundamental rights scheme, further diluting the strength of parliamentary sovereignty. The European Economic Community established a common market in which the citizens of member states enjoyed freedom of movement for economic purposes. Today, this is now understood as a freedom of movement and residence guaranteed as an aspect of EU citizenship, extended to family members without regard to nationality (Bradley and Ewing, 2010, p. 418). The free movement of persons is understood as a fundamental right at the EU-level.

What is the right and what does it mean for the individual? EU nationals have the right to free movement under the EU Treaties, including the right to live and work in any of the other member states of the union. EU citizens have a right of entry and residence to

the UK and other states as long as they are coming to the country in the exercise of a Treaty right e.g. the right to take up employment or to set up business (HM Passport Office, 2014). Student and self-sufficient persons (e.g. retired persons) also have right to entry and residence in a non-economic capacity. (Individuals in Iceland, Liechtenstein and Norway as part of the European Economic Area, enjoy freedom of movement within that area which includes the EU). A US citizen in contrast must apply, for example, for a Standard Visitor visa if they want to visit the UK for leisure, business, or to receive private medical treatment but that is for six months only. For shorter 90 day visits, the need for a visa is waived. Citizens from all other parts of the world also follow a complex system of visa arrangements. Their right to freely move across borders does not exist as it does within the EU and not without extensive conditions and significant bureaucratic obstacles.

The right of the free movement of persons for EU citizens is one of the four ‘fundamental freedoms’ that comprise what is known as the EU’s single market – which is based on the idea of ensuring the free movement of persons, goods, services and capital. The Single Market is central to the original Treaty of Rome, for the original six members of the then European Economic Community (EEC). It was not however until the Single European Act 1987, amending the Treaty of Rome, that created a single internal market, which had otherwise proved difficult under the existing EU Treaties. Article 2 of the Treaty of Rome in 1957 had set out the objectives of the then EEC to establish a common market and Article 3(1)(c) EEC provided that the Community aspired to ‘the abolition, as between member states, of obstacles to freedom of movement for[...]persons’. The free movement rights set out in this Treaty were confined to persons who exercised economic activity and were a national of a member state.

The principle of free movement is qualified at the EU level because since the formation of the EU, specific rules have been written to provide for the movement of only certain groups of EU ‘workers’ within its territory. (These are distinguishable from the rules applicable to nationals from outside the EU (‘third country nationals’) which will not be discussed in this chapter). It therefore included key supporting provisions to ensure rules within individual national social security systems would not act as a barrier/disincentive for workers and their families to move between member states. Other associated Treaty provisions permitted the general principle of non-discrimination on the grounds of nationality; for example, a German worker in the UK must enjoy the same treatment as a British worker working outside the UK but within the EU. The free movement principle also only applies when there is movement between member states and is not to be applied to internal domestic situations. Fundamental ‘freedoms’ tend to be

legally and materially categorised as fundamental 'rights'. Specifically, fundamental rights were in fact not directly acknowledged in the original Treaty of Rome and the EU still lacks a comprehensive fundamental rights competence (Douglas-Scott, 2015, p. 273). The Union is said to have a limited capability as a human rights organisation. Originally, fundamental rights were considered a 'peripheral' element of the EU construction (Hrestic, 2014).

The right to freedom of movement of persons – the qualifications

From early on, two significant measures implemented the rights of free movement for workers in the 1960s – Council Directive 68/360 on free movement for workers within the then European Community and EEC Regulation 1612/68 on the abolition of restrictions on movement and residence within the EC for workers of member states and their families. The UK has historically contested specific aspects of border control policy relating to the conditionality of free movement. The UK and Ireland did not participate in the Schengen Agreement – designed, in 1985, to abolish immigration controls between EU states (Bradley and Ewing, 2010, p. 440). The Amsterdam Treaty in 1997 confirmed that the UK and Ireland would not be bound by the Schengen acquis but later participated in some measures (e.g. police forces sharing law enforcement data through the Schengen Information System) to the extent that EU politics and law still exercises a dominant influence on UK immigration policy (Sobolewska and Ford, 2016).

This further developed in the 1990s, when the EC adopted three Directives which conferred a general right of movement and residence on the retired, students and those with independent means, on the basis that they had sufficient resources and medical insurance. As one recent Coalition Government policy document on the free movement of persons in the single market observed of those pre-Maastricht changes in the 1990s, “This reflected the gradual change which had been taking place in relation to the link between economic activity and free movement – moving towards the idea of migrants as individuals with rights in their host member state.” (Home Office, 2014). EU powers were enlarged to include matters that affected individuals as human beings and not just as economic actors (Pérez, 2009, p. 14). In the contemporary EU, more than 3.2 million EU citizens live in the UK (Hawkins, 2017) and 1.2 million UK citizens live abroad within the EU (McGuinness, 2017).

The right to free movement of persons was further clarified in legislation in 2004 by the ‘Free Movement Directive’ (Directive 2004/38/EC) and the ‘Free Movement of Workers Regulation’ (Regulation 1612/68 by Regulation 492/2011) (Marzocchi, 2017). Following the adoption of this Directive, the ECJ sought to expand free movement rights through a series of rulings. The rules have been significantly expanded in scope to cover the family members of workers who choose to exercise their free movement rights. However, EU Treaty provisions from the beginning have allowed for the ‘export’ of particular benefits, meaning that, if a British person remains eligible for a benefit in the UK, they can still receive it in another, and likewise EU persons in the UK. The ongoing seminal ECJ cases of *Baumbast* confirmed the contemporary severing of the relationship between migration and the need to be economically active (*Baumbast and R v Secretary of State for the Home Department* [1999]), the *Metock* [2008] judgement extended the free movement rights even further for family members, and *Zambrano* [2011] on deciding the criteria for the ‘right to reside’ for EU citizens. The right of the free movement of persons has focused on its understanding as a fundamental right at the EU-level.

In this context, it is notable that several recent UK-specific EU interventions between 2013 and 2016 sought to alter or change the character of the EU right to free movement. Those claims and (re)negotiations took place during the British debate ahead of the June 2016 Referendum on EU membership – and subsequently played a significant part in the majority decision of the British people to leave the EU in June 2016 (Curtice, 2017a; see also Heindlmaier and Blauburger, 2017; Sobolewska and Ford, 2016; Hobolt, 2016; Wilkinson and Hughes, 2016). Before inviting the voters in the 2016 referendum to make its choice, and whilst legislating for the referendum itself, the Prime Minister had been seeking to renegotiate the terms of the UK’s EU membership – with voters essentially being asked to decide whether the UK should remain a member of the EU under the Prime Minister’s newly renegotiated arrangements or to leave the EU altogether. Those renegotiations, one of the Prime Minister’s early statements in the *Financial Times* entitled ‘Free movement within Europe needs to be less free’, stated that “It is time for a new settlement which recognises that free movement is a central principle of the EU, but it cannot be a completely unqualified one” (Cameron, 2013a). During the Coalition Government period (2010-2015), the Prime Minister had already faced considerable pressure on the issue of EU immigration (Sobolewska and Ford, 2016) from within his own party and Government’s then coalition-shared parliamentary majority.

The impact of the EU fundamental right to free movement upon the UK fundamental rights scheme and the UK constitution

The example of the EU free movement right demonstrates that the UK governing helm of state has had EU rights incorporated into its constitution. This is achieved through a dependency upon EU-level rights by individuals in the UK, as EU citizens. It elevates the UK judiciary as a rights-adjudicating court system as it fuses ever-closer into the Luxembourg court system. This dilutes the domestic legislature as a rights-providing institution. The deep political claims made to the constitutional and institutional entrenchment of those ‘non-negotiable’ rights themselves, irrespective of their political legitimacy, has progressed this continued legislative decline and judicial advance in the UK, impacting indirectly upon the unsettling of parliamentary sovereignty.

With the introduction of EU free movement rights, several national executive powers come into play that others might argue have enhanced UK parliamentary sovereignty. The existing, centuries-old entrenched English common law approach that British subjects were free to do as they pleased unless expressly prohibited by law (Bradley and Ewing, 2010, p. 418) smoothed the way for free movement. The UK Government has been not merely a willing participant in promoting free movement rights, whether as provisions through national, EU or international mechanisms, but has been an active agent in promoting that right. But the reason why EU free movement has not reconfigured the executive to enhance parliamentary sovereignty is that the character and strength of that fundamental right is judicially-determined and presented as insurmountable by the legislature from the viewpoint of the unwieldiness of the executive. For the executive, it is torn when the free movement principle and policy is exercised, administered and protected as it dutifully permits free movement for UK and EU citizens in airports and ferry ports while at the same time, sharing its decision-making capacity over the policy. They must heed the judges who apply broad, conditions over the free movement principle (e.g. provision of welfare to those freely moving to the UK) – which helps to explain why disputes over that right are politically contentious.

The judicialisation of the freedom of movement of persons

Judicial rights-adjudicating and executive rights-respecting powers are distinct at the UK helm of state but judicial decision-making has nonetheless moved into the scope and

political space previously defined by parliamentary decision-making. As observed in Chapter 4, a substantial body of literature explains how European integration tends to encourage an enhanced judicialisation of politics (Weiler, 1994; Weiler, 1991), or ‘Eurolegalism’ (Kelemen, 2012, p. 55). This assumes that judicial institutions can answer deeply political questions on what constitutes a fundamental right within the political community. ‘Direct effect’ has meant that the UK helm of state has judicial EU institutions incorporated into its constitution with a direct, claimable relationship by UK-EU citizens of EU individual rights in their own national courts. This marks a direct competitive overreach of judicial- over parliamentary-rights determination which impacts beyond the weakening of legislative powers in the Commons to have its way vis-a-vis court- adjudicated Charter-rights and the unsettling of parliamentary sovereignty.

The incorporation of the free movement of persons into law as historical ‘fundamental right’, despite those rights being peripheral to the original EU construction (Hrestic, 2014), presents the right as pre-political, politically inarguable, unquestionable, or non-contestable concrete law. EU membership brought about a significant expansion of judicial power, not least because of the supremacy of EU law (Blauberger and Schmidt, 2017; Tabarelli, 2013, p. 346). Such a process occurs as national judiciaries become independent of executive and parliament functions as a consequence of their EU-related roles (Schmidt, 2005). Yet that process lacks both parliamentary legitimacy (consistent with Bellamy, 2007) and ministerial accountability (consistent with Tomkins (2013)) when the ECJ’s principles of divorcing free movement from economic migration (*Baumbast* [1999]) and the extension of the right to family members (*Metock* [2008]) and the ‘right to reside’ (*Zambrano* [2011]) are not subject to the consent of Parliament or a consensus among other state institutions.

The scope of judicial rights-provision widens into the sphere of legislative and executive political decision-making at the recognised helm when the ECJ interacting with EU level-rights decides on the operation of the free movement right. It has ‘fenced off’ the pervasive disagreement over immigration and recognition of the plurality within a community which for Waldron (1999) is fundamental for the recognition of rights. The fundamental right in the political sphere is contested and the open-ended politics over the freedom of movement in relation to UK as EU citizens will remain contested. A judicial power with the previous obligation to give effect to the statutes of Parliament under the traditional Westminster model now overlaps at the recognised helm with the provision of rights usually reserved for the executive majority-in-Parliament. The judiciary therefore further overreaches into the dominant, partisan, Government majority in the House of

Commons who might otherwise expect a consensual, intra-state responsibility in the determination of rights.

It is precisely because of EU leaders (notably, Chancellor Merkel) informing the then Prime Minister, David Cameron, of its status that he finally accepted the free movement right as non-negotiable (Mason and Oltermann, 2014; Tisdall, 2014). It affirmed that the entrenchment of the written, codified EU right to free movement trumped their political contestation through the European Council and in Westminster. The assumption that Parliament remains theoretically sovereign has been based on the ultimate rule of parliamentary sovereignty resting on the precedential basis that the subordinate provision of fundamental rights in the courts is less entrenched than Parliament. But that proposition no longer resonates with the political operation of the free movement principle.

In practice, the EU scheme of fundamental rights, such as broad free movement rights have been decided upon without sufficient political legitimacy with respect to the consent of the political community. This is why Parliament, being more accountable, makes better work of rights provision. It can provide, remedy and balance in line with the consent of the governed. Yet the provision of EU free movement rights has proceeded under a special legal and political entrenchment, if not only because of supremacy of EU law over UK law, the jurisdiction of the ECJ in settling fundamental rights disputes, the placement of free movement in the Charter incorporated into the Lisbon Treaty and through the progressive framing of that right in ECJ case law. Parliament is practically less sovereign – and so too are the people – given that the ultimate rule of parliamentary sovereignty no longer operates on its precedented foundation because the provision of the fundamental right to free movement is presented as a politically immovable, fully court-resolved, legally entrenched instrument with finality.

The non-negotiable right and the ‘fencing off’ of politics

At the very most, as the House of Commons’ European Scrutiny Committee Legal adviser suggested, the renegotiated package (Miller, 2016) contained a draft declaration by the European Commission on issues related to the abuse of the right of free movement of persons. It contained only a promise to adopt a proposal to “complement” the 2004 Directive relating to free movement rights of third country nationals. It promised to clarify the scope for member states to deport undesirable EU citizens in guidelines and examine future amendment in the 2004 Directive (Ridout, 2016). Its strength has been approached as politically insurmountable by the executive in the European Council or the process of

resolving contested issues in the national Parliament. The basic right to free movement, even since the Maastricht Treaty and the 2004 Directive, is itself firmly entrenched. However, the degree of entrenchment of free movement depends not on legality as is often assumed but on political legitimacy and the consent of the governed. Since there is jointly domestic pervasive disagreement over immigration in UK politics and EU integration favours the courts, questions over political legitimacy and the disagreement are marginalised by EU legal integration. While the UK accepted as legitimate since the European Communities Act 1972 and its 1975 referendum the principle and right to EC free movement, the gradually developing conditionality, progressively framed by ECJ case law (described by Blauberger and Schmidt, 2017; Ferraro and Carmona, 2015), were made in the context of weak political legitimacy i.e. by courts, and ministers at the European Council which bypasses elected representatives in legislatures. In so far as that process proceeds, it bypasses the consent of the electorate. After all, judges everywhere help to shape law but this is “especially true” in the EU where gaps must be filled in its legal framework and courts “... have much more manoeuvrability available to them than is customary within states.” (Nugent, 2010, p. 225). In short, the Prime Minister could not renegotiate the associated, entrenched rights during the 2015-16 period – it was mostly not allowed on the renegotiation menu (Fleming, 2013). Parliament remains practically less sovereign given that the ultimate rule of parliamentary sovereignty no longer operates on the precedented basis that the provision of free movement is at the very least part-entrenched and deemed politically non-negotiable in relation to the ultimate rule.

Parliamentary sovereignty and the shared responsibility for rights provision

The EU right to free movement has impacted upon parliamentary sovereignty previously resting on the historically precedented basis that the executive, the legislature and the judiciary enjoyed an official consensus in which they all have a shared responsibility for rights provision. Domestically, this has been further mediated by recent constitutional changes which have removed the official consensus between the arms of government, notably by the removal of the old Lord Chancellor’s under the Constitutional Reform Act 2005, previously acting as a driver to cement that consensus (Gee et al., 2015). The ECJ rulings of *Baumbast* [1999] and *Metock* [2008] and *Zambrano* [2011] are court rulings, not parliamentary votes. They create claimable rights through ECJ case law, not through political debate. That is not a shared responsibility. The principle of ‘direct effect’ more

generally, as enshrined by the ECJ, enables individuals to immediately invoke an EU provision before a national court or ECJ in relation to certain European acts, independent of whether a national law test exists. The executive, as mentioned above is torn, when it is elevated through the enforcer role of protecting free movement through passport controls and in acting against any barriers – yet where judges marginalise the authority of government-in-Parliament by acting above politics when those contested rights and limits are provided in the absence of intra-state consensus and the consent of the governed. That is not rights provision by consensus. The deference to the courts displaces what Hunt et al. (2012) state is the consensus and shared responsibility between the branches of government for rights provision. Free movement rights and their limits are deferred almost singularly to, the courts. Parliament is practically less sovereign when the incorporation of free movement rights unsettles that precedented foundation. The provision of the right to free movement is deferred on a skewed basis to the EU and national judiciary first, the torn position of the national executive second and only if irresolvable by law, to the ultimate loser in European integration, Parliament itself.

The right to free movement and its constraints have been, like other EU fundamental rights, historically framed progressively by the ECJ, then laid down as principle in the Lisbon Treaty and the associated Charter. This process has turned deeply political questions of providing for the rights of free movement by shared consensus into legalistic, judicial and procedural matters, to be decided almost solely and divisively by judges in courts or lawyers serving the executive, not to elected politicians in Parliament.

The UK has of course voluntarily agreed to the power of the ECJ under the EU Treaties. The Court of Justice of the EU (CJEU) in Luxembourg – consisting of both the ECJ and the General Court – is the EU's judicial institution and therefore for the UK. It interprets EU law to make sure it is applied uniformly in the UK as across all EU countries. It aims to ensure that the law is observed in the interpretation and application of the Treaties (Article 19 TEU; Bradley and Ewing, 2010, p. 122). It also settles legal disputes between the UK and all other EU governments and EU institutions. Individuals, companies or organisations can also bring cases before the Court if they feel their rights have been infringed by an EU institution (European Union, 2014). The UK has one judge in the Court as do all other EU member states, helped by nine 'advocates-general' (all appointed for a renewable term of six years) who present opinions on the cases brought before the Court. They insist that they do so publicly and impartially and in line with the Court's wider commitment to European integration. A judge and an advocate general are assigned to each

case that comes before the Court. In terms of jurisdiction, the ECJ and General Court have substantive jurisdiction on any aspect of EU lawfulness within the Treaties, including a fuller jurisdiction on legal questions following the Lisbon treaty, to decide on Union / Member states exclusive or shared competences and provision of fundamental rights (Ferraro and Carmona, 2015). The Court can pursue infringement proceedings against a member state when there is a failure to fulfil binding legal obligations which the state is committed to under EU law. In the application of the Charter of Fundamental Rights, the supremacy of EU law is further bolstered by the ECJ adjudicating on EU-member state decisions. In the case of a conflict, EU law must prevail over national law. The ECJ judgement is legally binding on the national court. The national court is the only one to resolve the dispute but it must apply the law provided by Luxembourg (Mayoral, 2016). The ECJ also ensures that an interpretation of EU law given in one preliminary ruling has binding legal effects in every other member state. The procedure has led towards the embedding of EU law in the UK's and all other national legal structures. The contribution of the Court of Justice to further EU integration is notably strong, particularly and paradoxically given its role as a court and not a political actor or institution.

The resulting marginalisation of politics from the shared consensus is also proven by David Cameron's attempt to renegotiate the fundamental rights of free movement at the European Council. This provides evidence of the marginalisation of politics in determining rights. It demonstrates that the Prime Minister-led political process of renegotiation at the European Council is subverted to the legal process of providing judicial rights under EU membership. The very nature of EU rules provides for the constitutional elevation of the Prime Ministerial-executive through its fusion with EU governmental machinery being made dependent upon the Prime Minister, with other Heads of State and respective Presidents of the European Council and Commission interacting to make decisions at the highest political level in the European Council (Kassim, 2016a). The legislature clearly has no such comparable connection or scrutiny to that of Prime Ministerial power within European Council-level institutional decision-making. The system of court-deferred rights ends up taking precedence over politically (re)negotiated rights. The transfer of the fundamental rights of free movement being subject to 'shared deferral' to the more singular deferral to the courts after the Maastricht Treaty and the subsequent 2004 Directive is pivotal, reflecting the change in meaning of fundamental rights. In that process, EU citizenship provided fertile breeding ground for directly effective claimable rights to be brought into operation.

It would be an exaggeration of this claim to suggest that such transformation underpinned a path to a popular constitutional state in which fundamental rights were elevated and the rule of recognition diminished, as Bogdanor (2009a) argues. The change from a ‘shared deferral’ system of fundamental rights to a singular deferral under EU membership, suggests the reverse of popular constitutional statism: a more narrowly defined power centred on the judiciary-deferred rights in which the relationship with popular, elected representatives in Parliament is disassociated from the content of rights. In that process, a more shared deferral of rights-making power (which might be expected under a written constitutional order) is being replaced, or at least diluted. If there is anything suggesting a ‘constitutionalisation’ of EU fundamental rights, it is more akin to Loughlin’s (2010) interpretation of *Marbury v Madison* [1803] in US constitutional history (see Loughlin, 2010: 296) in which one might argue a blurred relationship develops between UK statute and the fundamental law of the European Communities Act 1972. That has meant, instead of a consensus between the arms of government, a formal hierarchy begins to develop between the judiciary and the other branches of government for deferring constitutional interpretation of political problems where fundamental rights are relevant.

Parliamentary sovereignty, the free movement of persons and the House of Commons majority

It was first argued that EU free movement has impacted upon Parliament’s sovereignty because the subordinate provision of fundamental rights by the courts which previously posed only minor limits on the will of the Government’s parliamentary majority constituting the ultimate rule, now imposes more substantive limits on the will of that majority. In the case of free movement rights, a backbench business debate on stopping mass immigration from Romania and Bulgaria in April 2013 and the two Conservative rebellions – one on extending restrictions for Romanian and Bulgarian migration, another on the deporting of foreign criminals – created systematic political pressure upon the Prime Minister by his own colleagues (BBC News, 2014a; Backbench Business Committee, 2013). While this acted as political pressure, it was not sufficient enough to form a parliamentary majority (in all cases). While there was substantial friction created, David Cameron in supporting free movement rights did not transgress the will of the parliamentary majority – but did impact upon the will of his parliamentary party, which

indirectly affects that majority. The Government's support for the EU fundamental right to free movement did not strictly transgress the Government's parliamentary majority but it did unsettle that majority as it interacted with his own party's messaging and policy. It is likely that effect which led David Cameron to incorporate such a message into his General Election manifesto of 2015 (Conservative Party manifesto, 2015) and his earlier post-2013 EU renegotiation demands.

The theory that Parliament is sovereign on the basis that the provision of fundamental rights by judges is subordinate and poses no major limits on the will of the Government's parliamentary party majority fails to reconcile itself with the implementation of EU-level fundamental rights schemes. In that context, the Government's parliamentary party majority has a marginalised place in determining or finalising or setting out the operational criteria for such measures. Where the meaning and limitations upon free movement rights are subject to pervasive disagreement, there is no forum at the democratic level to resolve the disagreement because the Government's party majority has been marginalised in its role seeking the provision of the right. It could ultimately legislate against an EU fundamental right measure but not without serious political consequences e.g. infringement proceedings. When considering free movement, predominantly Conservative government backbench MPs in the above cases were warned by the then Home Office ministers that their policies and objectives were 'illegal' (Mallett, 2014), which reinforces the point that fundamental rights are claimed to be entrenched and that the politics and legitimacy of rights is to be marginalised at all costs. The limitations on free movement/immigration, previously the subject of parliamentary debate and vote, bypass the parliamentary institution and are presented as inarguable legal facts. Yet rights should only be taken seriously in a political system on the grounds that the system allows majority voting to settle disagreements as to what constitutes rights (Waldron, 1999, p. 307). Currently, under EU membership, national legislatures have lost traditional legislative powers of initiative and approval (Schmidt, 2005). The sheer magnitude of the impact of the Treaty of Rome, the 1960s EU legislation, the 1990s legislation, the Maastricht Treaty and the 2004 Directive and Regulations have been voluntarily accepted by the executive-in-European Council to embrace the free movement of persons principles but with a voluntarily accepted cost to Parliament. What is clear is first the more obvious governmental recognition of the legislation and Treaty provisions supporting free movement rights – because the ministerial executive acquires political legitimacy through the Council of Ministers and European Council and Intergovernmental Conferences, respectively – including the signing of the Lisbon Treaty along with Article 45(1) of the

Charter associated with it. Yet less obvious has been the progressive framing of case law in the ECJ such as *Baumbast* [1999] and *Metock* [2008] and *Zambrano* [2011], through a process of filling in the gaps (e.g. Blauberger and Schmidt, 2017; Ferraro and Carmona, 2015). That EU-level judicial process deprives the ultimate rule of the will of the Government's parliamentary majority in significant policy areas in which the provision of fundamental rights by judges is superior to the potential provisions afforded by the elected majority in the House of Commons. To consider this more fully, an alternative example of a fundamental right might be considered where the ECJ has played a significantly substantive role in its identification and operation.

Conclusion

Parliament remains theoretically sovereign because the ultimate rule of parliamentary sovereignty rested on the historically precedented basis in which the provision of fundamental rights is more greatly subject to recourse through political, parliamentary and privileged mechanisms than the subordinate provision offered by the courts. Under EU membership, the UK Parliament had however become practically less sovereign because the UK's helm of state has had EU-level fundamental rights schemes incorporated into it, including that of EU free movement of persons. In that process, EU fundamental rights schemes protected by the courts become constitutionally elevated, entrenched in codes of written and legal form. As such, rights have often been expressed as unchallengeable instruments above politics – complete with EU legal supremacy, direct effect and ECJ jurisdiction – relative to the precedented and minimalist provision afforded by Parliament. The submission of the domestic legislature in that key respect to the courts, along with a final binding effect upon the torn executive, impacts upon and unsettles parliamentary sovereignty.

The historical precedents of the British constitution in which governing at the helm is presented as legally distinct but politically contingent upon its capacity to determine and respect fundamental rights are severely diluted in the modern governing process. This chapter addressed this political contingency through appealing to the 'political constitutionalism' of Jeremy Waldron (1999), Richard Bellamy (2007) and Adam Tomkins (2013). It addresses the primacy of political legitimacy over constitutional entrenchment and challenges the contemporary narrow determination of rights by courts in favour of a shared responsibility by the executive, legislature and judiciary. It challenges the approach of supranational legalism in claiming to determine EU rights through the prism of

democratic parliamentary majorities. The case study examining the EU free movement right demonstrates that the UK governing helm of state has had EU rights incorporated into its constitution through a dependency upon EU-level rights by individuals in the UK, as EU citizens, in order to protect their interests to move freely. It has led to the elevation of the judiciary as a rights-adjudicating court system as it fuses ever-closer into the Luxembourg court system. This has meant the dilution of the domestic legislature as a rights-protecting institution. What is seen by mainstream legalist interpretation and constitutional state perspectives as EU rights experiencing an enhanced depth of constitutional entrenchment of the rights themselves has isolated itself from questions of political legitimacy and parliamentary majorities. Its further tendency to disregard the disappearing consensus between the arms of state and community in protecting rights has neglected this important dimension contributing towards the continued legislative decline and judicial advance in the UK, impacting indirectly upon the unsettling of parliamentary sovereignty.

The subsequent chapter (Chapter 7) will argue that where the UK Parliament has become less sovereign due to the incremental removal of parliamentary power over policy and law, it provides an executive-legislature accountability gap. David Cameron's Prime Ministerial-led renegotiation ahead of the EU Referendum provided significant evidence of such an accountability gap under EU membership. The subsequent EU Referendum of June 2016 and Parliament's subsequent and ultimate power to decide on the UK's EU relationship permits the executive to pursue a constitutional resettlement, if it so chooses, to address the historical dilution of parliamentary powers. It signifies the resettlement of Parliament with a historically precedented basis – namely, of government pursued through the consent of the electorate – in which the operation of Parliament's ultimate decision-making power over political decisions was maintained by the Government-in-Parliament on behalf of its electors. Subsequent developments in determining the UK Government's 'Brexit' policy have suggested a major, if not enhanced role for politics in determining the character of Parliament's sovereignty – and with it, the implication that the Referendum and subsequent events enhance, not erode, the principle of representative government and parliamentary sovereignty.

Chapter 7: A further resettling? Parliamentary sovereignty following the EU referendum

Following the consideration of three case studies in Chapters 4, 5 and 6 in which EU policies have unsettled previous historical constitutional forms of parliamentary sovereignty, this final case study considers the UK's EU referendum as a further resettling of past constitutional forms. Where the UK Parliament has become less sovereign due to the incremental removal of parliamentary power over policy and law under EU membership it provides an executive-legislature accountability gap. David Cameron's Prime Ministerial-led renegotiation ahead of the EU referendum provided significant evidence of that accountability gap under EU membership. The Prime Ministerial position of David Cameron to establish a 'best deal for the UK' removed Parliament's ultimate decision-making power over political decisions, prohibiting it from bridging the divide between the executive at the European Council and Westminster's accountability, its votes on the floor of the House of Commons, oversight, scrutiny and potential revisions of the best possible deal.

A consideration of the final case study, namely the EU referendum of June 2016, illustrates that Parliament's ultimate power to decide on the UK's EU relationship could establish a new constitutional resettlement, if it so chooses, to address the historical dilution of parliamentary powers. As the UK seeks to un-incorporate EU-level decision-making by pursuing a policy of leaving the EU, the barebones of parliament's potential regaining of its ultimate decision-making power which reaffirm Parliament as sovereign are evident (contra Mabbett, 2017). Such a step signifies a further resettlement of Parliament with a historically precedented basis in which the operation of Parliament's ultimate decision-making power over political decisions was maintained by the Government through Parliament on behalf of its electorate.

This chapter first begins with an analysis of the historical constitutional forms, as precedents, presenting a British constitution in which governing at the helm is presented as dependent upon both historical form six and eight acting as guiding precedents for government by consent. It is both the consent of the people in referendum, like Burke's political parties in elections seeking consent of the people, that enables the alignment of power between the executive and the legislature. The sixth constitutional form of the balanced constitution depends upon government through the mixed monarchical (monarch), aristocratic (Lords) and democratic (Commons representing people) powers,

based upon the collective representation of the electorate. The eighth constitutional form of sovereignty is exercised by Government through the political elites in Parliament and with external bodies, including the EU and on rare occasions, through national referendums. The constitutional form works because Parliament's legitimate exercise of ultimate decision-making power over political decisions appears to depend upon a deliberative assembly, collectively representing the electorate as a whole, and in which political parties exercised their power as a constitutional link between the executive and the parliament (Burke, 1774; Burke, 1792). But it exercises that traditional power in a contemporary, British constitution in which governing at the helm is frequently dependent upon the continuity of political representation by consent through Parliament in addition to Parliament ruling through external agencies, commissions or bodies, the EU and if parliament wishes, by national referendums. Both the sixth and the eighth historical constitutional forms accumulatively act as guiding precedents in that the decisions on vital issues as a deliberative assembly in the recognised helm are necessarily interwoven into the contemporary powers of Parliament including its ability to outsource that decision-making capacity over political decisions. They are both strongly dependent upon Dicey's principle of government by consent – and are central to the further resettling of parliamentary sovereignty following the EU referendum.

There is then a brief consideration of the explanatory theories which undermine the relationship of parliamentary decision-making to sovereignty, portraying it instead as subsidiary to elements of popular or judicial power (Bogdanor, 2009a), but which can be redressed by focusing on politics and political constitutionalism more specifically. By considering the UK's holding of referendum on the EU, several developments suggest a central resettlement, if not enhanced role, for politics in determining the character of Parliament's sovereignty:

- The Prime Ministerial-led renegotiation marginalising parliamentary involvement;
- Parliament reclaiming of its sovereignty as a legislature (through the EU Referendum Act 2015);
- The voters directly tasking Parliament to exercise its ultimate power to 'leave the EU';
- The subsequent championing of parliamentary scrutiny by MPs and Select Committees;
- The gravitational pull for Parliament to act as guardian of fundamental rights and;

- The instituting of Parliament's objectives to vote over the final UK-EU deal and the Repeal Bill.
- The Supreme Court's judgement in *Miller* [2017] effectively put Parliament centre-stage in the decision-making process (Eleftheriadis, 2017) and in which the 'best deal' required making political decisions in Parliament.

It is concluded in significant areas, however, that the referendum aftermath, the Supreme Court and the Bill triggering Article 50 as well as enacting the Repeal Bill affirms that a referendum is an essential complement (not a substitute of) parliamentary votes and legislation to exercise ultimate parliamentary decision-making over the UK's EU relationship. It also affirms that the Supreme Court would operate as 'guardian' of the constitution while confirming Parliament's ultimate decision-making power over EU membership, consistent with some aspects of common law constitutionalism. Overall, this suggests the holding of a referendum on the UK's membership of the EU has enhanced, not eroded, the principle of representative government and Parliamentary sovereignty (contra Mabbett, 2017; McKibbin, 2017, p. 385; Wellings and Vines, 2016). The EU referendum has further resettled previous historical constitutional forms of parliamentary sovereignty.

Resettling the historical precedent of ultimate parliamentary decision-making power

Parliamentary sovereignty is impacted upon by an unsettling of previous historical constitutional forms – and in the case study of the EU referendum, two significant constitutional forms have been further resettled. Parliament's political authority rests upon historical constitutional forms, as precedents presenting a British constitution in which governing at the helm is presented as dependent upon the Parliament's sovereign capacity to exercise ultimate decision-making power. In particular, Edmund Burke's ordering of historical precedents in the sixth historical mixed constitutional form observes Parliament as "a deliberative assembly of one nation, with one interest, that of the whole" which collectively represents the electorate as a whole and in which political parties exercised their power as a constitutional link between the executive and parliament (Burke, 1774; Burke, 1792). However, a more recent modified precedent – presented in the eighth historical constitutional form in the latter part of the twentieth century – provides for a British constitution in which the recognised helm is dependent upon the continuity of

political representation through Parliament in addition to Parliament ruling through external agencies, commissions or bodies, the EU and should it wish, by national referendums. Both historical constitutional form six and eight accumulatively act as guiding historical precedents in that the capacity for Parliament to make political decisions on vital issues as a deliberative assembly in the recognised helm is enmeshed into the contemporary powers of Parliament to outsource that decision-making capacity by referendum. The sixth form of the balanced constitution depends upon government through the mixed monarchical (monarch), aristocratic (Lords) and democratic (Commons representing people) powers, largely in the interests however of a parliamentary oligarchy. The eighth constitutional form of sovereignty is one exercised by Government through the political elites in Parliament and with external bodies, including the EU and on rare occasions, through national referendums. Both constitutional forms depend upon Dicey's principle of government by consent of the electorate. Burke himself, in his own tradition, would not have countenanced the proposition of a referendum, or any public instruction or mandate for Parliament, as it would be wholly irreconcilable with Members, exercising their independent judgements as trustees, in the exercise of Parliament's sovereignty and the British constitution (Burke, 1774). Yet Dicey's cementing of election and of referendums, which permit the consent of the people in the last resort, is relevant to resettling parliamentary sovereignty following the EU referendum. It is the consent of the people in referendum, like Burke's political parties in elections, seeking consent of the people that enables the resettling through Parliament regaining from the EU its centrality of political decision-making and a realignment of power between the executive and the legislature.

The previous case studies presented in Chapters 4, 5 and 6 demonstrated how contemporary understandings have unsettled previous historical constitutional forms of parliamentary sovereignty. For example, it has been argued in this thesis that parliamentary sovereignty is impacted upon when there is an unsettling of the sixth of the eight historical constitutional forms, reflected in 'What the Crown-*in*-mixed constitutional Parliament enacts is law' (Chapter 4; Lieberman, 2006, p. 318; Blackstone, 1765, pp. i, 50-2). The case study of the EU-level Financial Transaction Tax in Chapter 4 demonstrated that the EU institutions incorporated into the UK's recognised helm have, through the unsettling of the historical precedented mixed constitution model, impacted upon the unsettling of parliamentary sovereignty. After all, on the very issue of taxation itself, the 1689 Bill of Rights established for the House of Commons – not the European Commission – a sole right to authorise taxation and the level of financial supply to the Crown. Chapter 5 argued

that Parliament became effectively less sovereign when the European Parliament's high level of specialist 'functional' representation (Marsh and Norris, 1997, p. 158) unsettles the precedent of 'collective representation' of the people through a Westminster model of representation characterised by both a 'trustee' representative status of its elected Members of Parliament and a collective parliamentary status by which Parliament acts in the common, collective interest. The case study of the Working Time Directive showed that the European Parliament's competition and its shared neo-corporatist emphasis relative to Westminster produces a distortion of the historically precedented capacity to collectively represent its electors, thereby diluting the strength of parliamentary sovereignty. Chapter 6 argued that Parliament has become effectively less sovereign because EU-level fundamental rights schemes, entrenched in codes of written and legal form, unsettles rights made through recourse to precedented political, parliamentary mechanisms rather than the subordinate provision offered by the courts. The case study of the EU free movement right makes evident that the recognised helm has had EU rights incorporated into its constitution through a dependency upon EU-level rights, leading to the dilution of the domestic legislature at the helm as a rights-providing institution. In considering the events following the EU referendum, two precedented constitutional forms which were unsettled under EU membership have now been further resettled.

Historical constitutional forms define the unsettling of precedented sovereignty. In short, when there is an experience of friction or conflict between past, historical constitutional forms of the UK constitution, it is helpful to consider the friction or unbalancing of past constitutional conventions as 'unsettling'. When a present day constitutional form in the eighth stage is in conflict with a feature from within one of the previous seven historical constitutional forms, an unsettling and subsequent resettling occurs. The nature of that unsettling centres on the shift from one constitutional form – or more likely, a shift in a particular feature of the form – to a newer or different one, particularly a past historical form in transition towards the contemporary eighth form. A further resettling through the UK's EU referendum of 2016 itself occurs within the eighth constitutional form.

The principle of leaving the EU under the 2016 EU referendum

The case study of the UK's referendum on EU membership in June 2016 and the resulting vote 'to leave' the EU demonstrates that the people of the UK voted to leave the EU by a

margin of 17.4 million people (52 per cent) to 16.1 million (48 per cent) on a significant 72 per cent turnout. Leave won the majority of votes in England (53.4 per cent Leave, 46.6 per cent Remain) and Wales (52.5 per cent Leave, 47.5 per cent Remain), although not in Scotland (38 per cent Leave, 62 per cent Remain) or Northern Ireland (44.2 per cent Leave, 55.8 per cent Remain). After the referendum, most voters were content with the choice that they made (Curtice, 2016; Curtice, 2017b; Curtice, 2017c) and were committed to the decision they made at the time of the referendum.

What was the referendum and what did it mean for the individual? On 23 June 2016, a referendum asked UK voters to vote on the question, ‘Should the United Kingdom remain a member of the European Union or leave the European Union?’ The then Conservative Prime Minister David Cameron believed that voting to remain in the EU would be the best decision for the UK and held that he had negotiated a “new settlement” with the EU ahead of the referendum (Lang et al., 2016). On 23rd January 2013, when David Cameron first announced in a speech at Bloomberg Headquarters that he would hold an In-Out referendum, this would take place after his attempted UK-EU renegotiation deal (Cameron, 2013b).

David Cameron and the Conservatives unexpectedly came to power in a post-2015 majority Government (Russell, 2016, p. 114), which resulted in him personally attempting to change the UK’s relationship with the EU to provide for a new settlement in advance of the referendum on the UK’s membership of the EU. He prepared a non-binding settlement with the Heads of other EU member state governments at the European Council of 17-19 February 2016 for the UK within the EU (Cameron, 2016a; Cameron, 2016b; Cameron, 2016c; Cameron, 2016d; Lang et al., 2016), with minimal, formal involvement of Parliament in drafting its terms, providing consent or statute. The Prime Minister and EU leaders hoped that such a settlement would convince UK voters to remain in the EU in the impending referendum.

The settlement consisted of a decision that there should be no discrimination against non-eurozone countries (such as the UK) because they are outside the eurozone (Cameron, 2016d). It confirmed the aims of the single market and free movement of people, goods, services and capital. It requested that steps must be taken to lower the regulatory burden on businesses. It provided that the concept of “ever closer union” would not apply to the UK (Lang et al., 2016). It indicated that 55 per cent of national parliaments will be able, if thought necessary, to prevent further discussion in the Council of EU legislative proposals. It clarified certain social benefits in relation to free movement such

as limiting full access to in-work benefits by newly arrived EU workers in certain situations but, ultimately, without the Prime Minister receiving any concessions on limiting free movement.

The day after the EU referendum, Prime Minister David Cameron made a statement in Downing Street respecting the vote to leave the EU, ahead of his resignation (Cameron, 2016e). The common assumption is that the Prime Minister's 'gamble' to call a referendum in which the majority of UK voters would favour remaining in the EU ultimately failed, making his continued policy and premiership unstable, if not untenable. The renegotiation was itself a "great miscalculation" (Glencross, 2016). It not only demonstrated inflexibility on the free movement of people but that, in sum, "Cameron blundered by promising so much and delivering little when it came to the UK's position within the EU" (Glencross, 2016). He also urged a negotiation with the EU would need to begin under a new Prime Minister. He insisted the new Prime Minister would take the decision about when to trigger Article 50 – the EU's own withdrawal mechanism – and start the formal and legal process of leaving the EU, which the subsequent Prime Minister, Theresa May, remains committed to (May, 2017a). Externally, the official EU institutions' statement regretted the decision of the British people but, ultimately, they respected the decision; and the 'New Settlement' earlier agreed by David Cameron with the European Council in February 2016 ceased to exist (European Parliament, 2016).

For many, the referendum itself (indirectly) and the decision to leave (directly) were attempts to wrest back control – 'Vote Leave and take back control' was the campaign mantra – over decision-making from EU institutions. Nearly half of those Leave voters surveyed chose to leave in recognition of the "principle that decisions about the UK should be taken in the UK" (Ashcroft, 2016), affirming a primacy of government where decisions are taken by UK rather than EU decision-making bodies. Sovereignty was paramount, expressed as the ability for UK electors to make their own decisions through their elected Parliament and not have those decisions presented to them at the EU-level. As many as 60 per cent agreed in one survey that the EU had "undermined the powers of the UK parliament" while just 17 per cent disagreed (see Curtice, 2017a, p. 11). Further polls found that sovereignty had been the main motivation for 53 per cent of Leave voters (ComRes, 2016; Clarke et al., 2016). According to the British Election Study, the vast majority who described sovereignty (90 per cent) and immigration (88 per cent) as the most important issue voted Leave, compared to only a small minority (15 per cent) who viewed the economy as the most important (Swales, 2016, p. 13; see also Prosser et al.,

2016). On the leave side, "...the EU was seen as irredeemable precisely because it erodes national sovereignty ..." (Geddes, 2016, p. 266). In context, the vote reflected ongoing records and surveys which had long demonstrated a Eurosceptic Britishness in the electorate which has become politically dominant (Gifford, 2008; Gifford, 2010; Gifford, 2014). Euroscepticism had become mainstream in British politics, particularly within the Conservative Party (Geddes, 2016, p. 265). The relevance of sovereignty to those eventual Leave voters who had been waiting for David Cameron's renegotiation in EU powers was pivotal (Curtice, 2017b; Geddes, 2016). There had been a doubling between 1992 and 2014 of those supporting EU exit (10 per cent to 24 per cent) but importantly, a growth in those sceptical and who wanted to see EU powers reduced (30 per cent to 38 percent) (The British Election Study, 2016; Geddes, 2016). By 2015, two thirds opposed the UK's existing relationship with the EU, with 22 per cent saying we should leave, 43 per cent wanting a reduction in EU powers (Swales, 2016, p. 5; see also Curtice, 2017b). Cameron's renegotiation strategy rested on the need to convince the substantial number of 'Remain but reduce powers' camp that his renegotiation amounted to a substantive change and a reduction in EU power (Geddes, 2016, p. 270; Curtice, 2017b) – but it did not. Having considered the referendum itself, the precedent of holding a referendum also needs to be formally understood alongside its broader resettlement in the current UK-EU context.

The constitutional precedent of referendums

Qvortrup (2015) highlights that a referendum is a vote taken by the whole of a people on a policy issue. Under the referendum, the voters do not have the right to initiate legislation – they can merely approve or reject proposals put forward by the legislature. The referendum is a complement to indirect democracy; an "addendum not an institution that challenged the principle of representative government" (Qvortrup, 2015, p. 7). The referendum is therefore a complement to representative government, not an instance of popular sovereignty. As Dicey put it, a referendum provides formal recognition that the enactment of laws depends on the consent of the nationally, represented electorate (Qvortrup, 2015; Qvortrup, 1999; Dicey, 1911), not a circumvention of that consent. The historical constitutional forms (six and eight) of party political representation and representation by referendum reflect Dicey's view of government through the consent of the represented.

Although referendums are a highly irregular mechanism in the UK constitution, the 2016 referendum on EU membership has some precedents in the past 44 years of British

politics not only in relation to a European Community referendum but mostly devolution referendums. Since 1973, there have been only twelve referendums held in the UK:

- the first nation-wide referendum on 5 June 1975 on whether the UK should stay in the European Community (yes);
- the Scottish devolution referendum on 11 September 1979 on whether there should be a Scottish Parliament and whether the Scottish Parliament should have tax varying powers (both referendums received a yes vote);
- the second nation-wide referendum on 5 May 2011 on whether to change the voting system for electing MPs to the House of Commons from first past the post to the alternative vote (no) and;
- the referendum on 18 September 2014 on whether Scotland should become an independent country (no).
- the referendum on 23 June 2016 on whether the UK should remain a member of or leave the EU (leave).

However, the first UK-wide referendum held in 1975 on the UK's continued membership of the European Community was the first British precedent for a national referendum on staying in the Community, which was affirmed with 67 per cent of the vote (Swales, 2016, p. 4) on a turnout of 64 per cent (Geddes, 2013, p. 65). The third UK-wide referendum in 2016 was met with a verdict of leaving the EU.

There have been three distinct occasions for justifying referendums:

- (i) as mechanisms for managing disagreement i.e. to keep a party or a coalition together'
- (ii) as a negotiating tactic, as part of a bargaining or negotiating process;
- (iii) as a plebiscitary referendum, to by-pass a legislature by calling a referendum (Qvortrup, 2015, pp. 16-17).

To re-interpret Qvortrup, it is relevant however that in 1975 and 2016, the Prime Minister, as party leader, deployed the referendum to both manage coalition and internal party disagreement (case i, also corresponding to Opperman's (2011) domestic/defensive typology) and to pursue a broader and longer process of an EU (re)negotiation process (case ii). Separately, however, the Parliament, and in particular its EU-critical, predominantly Conservative government backbench MPs, arguably legislated for a referendum because they wished for the issue in Parliament to bypass the ordinary

European-integrationist government policy and legislature as a plebiscitary referendum (case iii), combined with cementing their view in a renegotiation to have proper settlement, if not an alternative, looser UK-EU resettlement which would address their constituents (albeit, not their) concerns (case ii). Qvortrup also tends not to focus on the function that “referendums should be a constitutional safeguard” (Qvortrup, 2015, p. 39), yet such a function has some relevance in relation to the UK’s experience of continued European integration where, without a written constitution, Parliament has few other constitutional safeguards or institutional safety-valves outside government to protect its own institution or its electors.

The 2016 EU referendum and Parliament resettling the UK’s relationship to the EU

What does the decision to hold the referendum and the referendum decision itself mean for the UK’s relationship to the EU? The referendum decision and the proceeding Government policy has meant the UK “constitutional settlement is in flux” in relation to that decision (The UK in a Changing Europe Initiative and The Political Studies Association, 2016b; Young and Gee, 2016), albeit Parliament’s decision-making power over recasting the UK’s new EU relationship – led presently by Theresa May’s Government – occupies a renewed, elevated and central position in the constitutional resettlement. The relationship between the UK and the EU was not settled immediately following the referendum (The UK in a Changing Europe Initiative and Political Studies Association, 2016a); but with referendums enabling a relationship to be reframed and re-imagined (Oliver, 2015), the exit from the EU is now being negotiated. The referendum result indicates that the majority of the voting electorate in a UK-wide referendum want to ‘Leave’ the EU, albeit a minority wanted to Remain and a wide variety of political actors have frustrations and reservations of precisely what the new future settled relationship might look like, politically, legally and economically.

Historically, after 44 years membership of the EU, the UK’s withdrawal, if achieved, will mean Parliament regaining from the EU its centrality to decision-making over key political decisions. The resettlement means Parliament will be called upon to decide on policies as broad in scope as:

- the rights of EU nationals presently in the UK and of UK nationals in the other EU 27 countries;

- the future UK-EU trading relationship; deciding on the economy including foreign direct investment (FDI);
- controlling immigration and its effect on the labour market;
- a business and financial services national regulatory regime;
- UK employment rights previously based on EU law;
- replacements following a departure from the Common Agricultural Policy (CAP) and its subsidy and regulatory regime;
- gaining a policy on fisheries for the UK to obtain exclusive national fishing rights;
- changes to environmental standards;
- trading with the European Energy Market;
- changes to law on aviation, shipping, public transport including rail and bus, and road haulage;
- the UK remaining bound by EU free movement of people laws;
- arrangements with the EU over policing and criminal justice measures;
- the human rights obligations of the EU Treaties;
- entitlement to welfare benefits for people moving between EU member states;
- reciprocal access to healthcare and the working hours of doctors;
- provisions for students and research, in terms of research funding, student loans or maintenance funding;
- consumer protection in the UK;
- deciding on foreign and defence policy;
- changes to the funds for development cooperation and humanitarian aid, and;
- potential policy and legislative divergence in areas of devolved competence (Newson, 2017; House of Commons Library, 2016).

There are a whole variety of issues which the Government in Parliament will decide upon that determine the future form of UK-EU relationship, including whether to:

- retain the European Economic Area (EEA) (e.g. Norway) and the single market and its position towards Free Trade or locating itself within the Customs Union (e.g. Turkey);
- exiting the EU and into WTO rules ('no deal' option);
- limiting the free movement for goods, services, capital and people (e.g. Switzerland);
- whether the UK wishes to make substantial financial contributions;

- the application of EU rules with influence and vote and;
- its ability to make third-party trade deals (e.g. Singapore and Canada) (The UK in a Changing Europe Initiative and Political Studies Association, 2016a).

In Westminster terms, the earlier role of all political parties – with the exception of the SNP – in legislating for a Referendum Bill with the public choice to leave or remain, was predicated on an ongoing unease among Westminster’s elected representatives in simply supporting the status quo relationship with the EU (even with the Prime Minister’s fudged deal) but where its majority of 479 out of 650 MPs were overwhelmingly committed to remaining in the EU (Menon, 2016). The majority of MPs therefore accepted the legitimacy of legislating for that public choice in order for Government-in-Parliament to seek a settlement.

The current Government’s policy is committed ‘to leave’, having begun the ‘Article 50’ negotiations in June 2017 with the aim of reaching an agreement about the UK’s future partnership by the time the 2-year Article 50 process has concluded in March 2019 (May, 2017a, 2017b; Davis, 2017; The UK in a Changing Europe Initiative and Political Studies Association, 2016a). The expression to leave establishes a number of different options for the Government, along with Parliament, to consider for the UK’s relationship to the EU in terms of its degree of integration or separation from the existing model, a great deal of which is unsettled at this stage. The Prime Minister Theresa May maintains that as the British people voted to leave the EU, it is the job of the Government to deliver that “instruction” (May, 2017a). The Government are pushing for UK ‘access’ to the single market (not membership of it), an ambitious tariff free trade agreement with the EU, and negotiate the Customs Union so that the UK can strike its own comprehensive trade agreements with other countries, ending the unfettered free movement principle, pulling out of the ECJ, while remaining “a fully independent, sovereign nation” with a commitment to free trade (May, 2017a, 2017b; Davis, 2017; May, 2016). The Government has put before Parliament a Repeal Bill to repeal the European Communities Act and convert the relevant ‘acquis’ – the body of existing EU law – into British law (May, 2017a). The Government have been cautious not to show their hand for the detailed basis of Article 50 negotiations. The aftermath of the referendum and subsequent Government policy pursuing Brexit led to hardening of opinion against that referendum verdict and Government policy both by leading personalities in the EU institutions and by member states (see Coleman et al., 2017; Hagemann, 2016). The subsequent *Miller* judgement in the Supreme Court had paradoxically made Parliament itself the single most legally

necessary and politically legitimate authority to accept, modify or reject the UK Government's proposed relationship to the EU (*Miller* [2017]; see Eleftheriadis, 2017). The paradox lies in a Supreme Court judgement, deploying common law rights arguments yet resettling Parliament as centre-stage – beyond the power of both the courts and the sole will of the executive (through prerogative).

For its part, Parliament legislated for the EU referendum through the European Union Referendum Act 2015. The House of Commons voted the Bill through by 544 to 53 votes at second reading (a ratio of six to one in the Commons), the latter of which only the SNP voted against (House of Commons, 2015). If not more fundamentally, electors on 23rd June 2016 directly tasked Parliament to exercise its ultimate decision-making powers to implement the majority decision to 'leave the EU'. The House of Commons' held a vote on a Motion calling on the Government to invoke Article 50 by 31 March 2017, which again was supported by 448 to 75 MPs, with again predominantly SNP MPs opposing (House of Commons, 2016a). The House of Commons also passed the formal European Union (Notification of Withdrawal) Act 2017, formally affirming the triggering of Article 50, by 498 to 114 votes at second reading (House of Commons, 2017a; BBC News, 2017a), despite being asked by the Supreme Court to take the initiative to do so (*Miller* [2017]).

Parliamentary sovereignty and resettling the contemporary power of Parliament

The ultimate decision-making power of Parliament over political decisions

It is necessary to recognise the contemporary relationship between parliamentary sovereignty and the ultimate decision making-power of Parliament over political decisions as impacted upon by EU membership – particularly in contrast to underlying features of Bogdanor's (2009a) constitutional state theory and some of his assumptions which rest upon radical common law constitutionalism. Bogdanor's (2009a) constitutional state theory appears to underplay the effective decision-making on EU rules by Government and, by emphasising public power, often understates Parliament's institutional capacity with its partisan actors to bring about pressure to accept, reject or change the Government's decision on the UK's EU relationship. Specifically, also, on an alternative radical common law perspective, Bogdanor (2009a) and other theorists partially adopt the radical theory of national common law constitutionalism, which directly seeks to affirm the

power of a national court-decided, judicial, common law at the expense of the doctrine of parliamentary sovereignty as settling the final question over the deployment of parliamentary decision-making power over the UK-EU relationship. The argument is highly apposite when considering the High Court, then Supreme Court, in *Miller* held that an Act of Parliament would be needed before Article 50 could be triggered (*Miller* [2017]). The absence in those explanatory theories draws the thesis towards politics and political constitutionalism more specifically. Such a view would enable a sufficient consideration of sovereignty as defined by parliamentary decision-making power by adapting Burke's defence of MPs making the ultimate decisions in the political, parliamentary realm because of their collectively representing electors in which contested issues are reasoned through party competition, bridging the accountability gap between executive and legislative powers.

In employing the term 'ultimate' decision-making power of Parliament of political decisions relating to the UK's relationship with the EU, the contemporary Parliament has four overarching and general functions defining its powers:

- (i) To check the work of the Government through questioning government ministers, debating and the investigative work of committees pursuing scrutiny of Government's EU policy;
- (ii) To make and change legislation;
- (iii) To secure debates in which members discuss (support or oppose) Government policy, legislation and events of the day;
- (iv) To check and approve Government spending and taxation.

The power is 'ultimate' because Parliament has the highest legal authority in the UK to create or end any law and which courts cannot overrule, nor Parliament bind its future Parliaments.

Constitutional state theory, common law constitutionalism and the undermining of parliamentary decision-making power

From a constitutional state perspective, Bogdanor's (2009a) theory has insufficiently reconciled parliamentary sovereignty and the ultimate power to make political decisions over policy and law. Part of the assumed segregation arises from overlooking the historical precedent of how parliamentary sovereignty reconciled itself with asserting its ultimate

political decision-making power in support or opposition to policy and law. It suffers from assuming that the popular power in a referendum equates with popular sovereignty which in turn supposedly trumps Parliament's sovereignty. Bogdanor's (2009a) assumption that Britain's era of constitutional reform after 1997, together with its 1973 entry into the European Communities, has paved the way for a new constitution is particularly concerning when it is considered to rest, unconvincingly, upon the shift from parliamentary sovereignty to a constitutional state based upon popular sovereignty (Bogdanor, 2009a, p. xiii). In its analysis, it underplays the effective power of decision-making on EU rules/membership by the Government by:

- overstating public power in relation to Government authority and Parliament's sovereignty.
- understating Parliament's own capacity to force an executive decision and therefore its implicit political will and power in deciding on EU rules.

Bogdanor achieves this objective by first, insisting, in line with radical common law constitutionalism that the effect of the European Communities Act 1972 is to bind future Parliaments. He holds it is a 'constitutional statute' (Bogdanor 2009a, p. 278); it could not be simply repealed. In consequence, Parliament cannot simply repeal the European Communities Act (Bogdanor 2009a, p. 278) but now, seemingly it can, armed with the people's instruction. The radical outcome of ultra-common law constitutionalism which Bogdanor relies upon to make his argument is that Parliament cannot decide on EU laws, or its membership, or repeal the European Communities Act – which the Government, after the 2016 EU referendum, is now proposing it do (May, 2017a). Bogdanor (2009a) adopts the radical theory of national common law constitutionalism which directly seeks to affirm the primacy of a national, court-decided common law at the expense of politics as settling the final question over the deployment of parliamentary decision-making power in relation to the EU. However, it is possible Bogdanor might accept that the European Communities Act being entrenched in this way in no way affects the ability of a Government to finally decide on EU rules, or categorically, the rules which compose its membership.

Bogdanor also sets out to achieve his objective by second, in line with his broader constitutional statist theory, consigning the referendum of the people to an exercise in popular sovereignty, a check upon the 'elective dictatorship' in British politics (Bogdanor 2009a, p. 275), rather than a discretionary act of parliamentary sovereignty, outsourcing its

decision-making capacity on a narrow question. In 2016, Bogdanor reaffirms that the referendum on EU membership crystallised the introduction of a new principle, the sovereignty of the people, into the British constitution, which supersedes the sovereignty of parliament (Bogdanor, 2016a; Bogdanor, 2016b). For Bogdanor, the referendum creates in effect “an extra chamber of parliament comprising in addition to the Queen, the Lords and the Commons, the people.” (Bogdanor, 2009a, p. 280). It resembles Dicey’s mischaracterisation of the referendum as an “alternative second chamber” (Dicey, 1911). The referendum, however, is not an exercise in popular sovereignty but popular decision-making power, which in turn, instructs the sovereign power. The power is limited only to the question in hand. It is a decision-making power only and it is, as Bogdanor accepts, ‘advisory’, not prescriptive. For Bogdanor, though, the instrument knowingly removes the centrality of Parliament. That is a difficult conclusion to draw given that Parliament is the only political actor to legislate for one and the joint-in-command (with Government) in deciding policy strategy in light of a referendum outcome (contra Bogdanor, 2016a, p. 348). Referendums if anything reinvigorate Parliament’s public power. The referendum is an addendum, not a challenge, to representative government (Qvortrup, 2015).

Parliament occupies a political centrality. Referendums on EU membership or EU rules cannot express the sovereignty of the people as this does not take into account the role of Parliament in triggering, asking the question, and providing a coherent policy after the referendum, consistent with the public instruction to Parliament by referendum. The people at no point have that ultimate decision-making power but they do have the decision-making power to support or oppose a specific policy which has been put before Parliament. This action confirms, not denies, Burke’s views of ultimate parliamentary power resting on party competition, exercised between the executive and legislature; yet, contrary to Burke, that parliamentary power is now more greatly subject to the will of the people.

However, constitutional state theory persuasively identifies mainstream parties in Parliament as central to justifying referendums: the 1975 referendum on the EC was called to reconcile opposition factions in the Labour Party (Bogdanor 2009a, p. 180, 185) in a situation whereby all three mainstream parties were committed to EEC membership. Again, ahead of the 2016 referendum, all mainstream parties in the 2015 general election had been committed to Remaining with EU membership (Bogdanor, 2016b) but the issue could not be resolved through the normal working of the party system. Furthermore, this impasse in party government advances the legitimacy question: a referendum is necessary on an issue of fundamental importance where the parliamentary vote is insufficient to ensure legitimacy (Bogdanor, 2009, p. 185). In making that claim, Bogdanor rightly

protects legitimacy as relevant. However, Bogdanor chooses to sidestep the referendum question by not addressing Parliament's power in Burke's sense whereby party competition in Parliament is exercised to bridge the executive-legislature divide.

The facets of radical common law constitutionalism and constitutional statism engendered in Bogdanor's view have more broadly overemphasised judicial and people power, respectively, as finalising what constitutes ultimate decision-making power in the British political tradition. Yet the British constitution provides neither the people or the common law court with an ultimate decision-making power in respect of making, altering and reversing political decisions. The dual tendency in this theory has troublingly sought to institutionally bypass the role of ongoing contestation in politics and that the way in which decisions are made, resolved and resettled serves to explain how Parliament maintains its sovereignty.

Political constitutionalism: addressing the vacuum in explaining parliamentary power

There is a notable absence in explanatory theories linking Parliament's decision-making power over political decisions in relation to parliamentary sovereignty, portraying it instead as subsidiary to popular power, or to judicial power (Bogdanor, 2009a). A focus on politics and political constitutionalism can redress this absence. Such a view would enable a sufficient consideration of sovereignty as parliamentary decision-making power by adapting Burke's defence of political representation in the sixth constitutional form as both (i) a collective parliamentary status by which Parliament acts as a deliberative assembly (Burke, 1774), and (ii) competing parties doing the representing act, when effective, as a constitutional link with strength and consistency between executive and legislature (Burke, 1770). The model of political constitutionalism on this basis helps to locate parliamentary sovereignty in the political realm since it assumes, there is an inherent and ongoing disagreement about substantive outcomes that society should achieve, and yet a recognised legitimate and effective parliamentary process for resolving these disagreements (see Bellamy, 2007; Waldron, 1999). Thus, no parliament may bind its successor. A recognised legitimate process to resolve disagreements and make policy and law requires the recognition of decision-making powers involved in that process.

Political constitutionalism might better address the absence in explanatory theories of Parliament's power in relation to parliamentary sovereignty because it looks beyond law and legal institutions and towards the legitimacy of political institutions as sites of

contestation (Waldron, 1999; Bellamy, 2007). A legitimate process of resolution could not be achieved via an appeal to the legal machinery and the judicial component alone. Although Richard Bellamy (2007) persuasively draws that model into a democratic tradition and the political constitutionalist tradition does at the very least inquire into political conditions in relation to Parliament's sovereignty, legal constitutionalists look only to identify judicially enforceable, external substantive limits on Parliament, grounded in the common law or the rule of law (Delaney, 2014). The inherent, institutionalised disagreement to seek alternative resettlement, as contained by backbench party competition, has an important part to play in bridging Government and Parliament's decision-making power both in conventional government and when outsourcing and regaining/reorienting policy after a referendum.

In an environment, particularly under EU membership in which there is a misalignment between the executive and the demoted legislature to scrutinise the executive (Hix and Goetz, 2000, p. 11), it is MPs in the House of Commons from their respective political parties which represent a constitutional link between executive and parliament in the recognised helm. Adapting Burke's observation is prescient because in describing Parliament's powers vis-a-vis the EU institutions as separate from the position of the executives-in-Parliament across Europe, a notable phenomenon is the specific and organised independence of party backbencher positions adopted in parliamentary chambers (Raunio and Hix, 2000), notably in the UK. Sufficient numbers of the government's majority backbench MPs within political parties are free (or not) to reorient, as Burke describes, forming a bridge between the executive and parliament. Such an approach preserves the centrality of parliamentary decision-making, via parties, and referendums as providing instruction to Parliament, beyond parties, as features which have otherwise been resisted in constitutional state 'popular sovereignty' approaches or the common law tradition.

Given the part European integration played in the diminished ability of parliaments to regulate executives (Raunio, 2011; Raunio and Hix, 2000; Schmidt, 1999), executives were provided with an arena for action away from domestic parliamentary scrutiny, and a near monopoly on information in a significant public policy space (Raunio and Hix, 2000, p. 163). By reaction rather than design, the parliaments of Europe since the 1990s established institutions and mechanisms that forced governments to explain their EU policies and actions in the European arena to parliaments. The real "driving force" behind this reasserted power has been the desire by backbench parliamentarians to "redress the

‘information gap’” between governing elites and the parliamentary rank-and-file (Raunio and Hix, 2000, p. 163). Backbench MPs confronted with European agendas, laws or politics, which can often be reduced or suppressed when open debates in Chamber sessions are avoided by the executive as far as possible, have the power to induce the minister, or Prime Minister, to act as a representative of the electorate, or act via its parliamentary committee (Benz, 2004, p. 887), particularly the European Scrutiny Committee in the House of Commons. The House and the Select Committees have opportunities to make ministers indirectly aware of their views on EU proposals, albeit *ex ante* controls and which in no way define Government mandates (Benz, 2004). Despite the considerable lack of involvement of Parliaments, backbench MPs and Select Committees in the EU governance process, and their apparent absence of contemporary direct decision-making powers, in Westminster they can still collectively and vigorously supply crucial rationales and articulate policy views to informally require ministers to reorient and augment that existing EU policy.

Political constitutionalism can better reformulate the absence in explanatory theories of Parliament’s power over political decisions in relation to parliamentary sovereignty through the incorporation of party competition into Parliament. As described in Chapter 5, it is political parties that are the primary vehicles that articulate citizens’ policy beliefs and convert them into public policies (Adams, 2001, p. 3). Voters’ choices of parties then provide them with a method of exercising indirect control over the actions of individual legislators and through these over the affairs of government (Adams, 2001, p. 4). Parties invariably vote as a bloc in Parliament – with few regular exceptions – and they exercise control over the government agenda and policy-making process in Parliament. The electorate use party policies as the basis for their voting decisions and provide effective vehicles for representing the electorate’s political beliefs (Adams, 2001, p. 5). Understanding the relationship between public opinion and party competition on Europe is important for domestic political contestation in the member states (Down and Wilson, 2010, p. 62).

The political constitutionalist tradition might better reconsider the absence in explanatory theories of Parliament’s power over political decisions in relation to parliamentary sovereignty because it conceives of the political environment of *dissensus* in which the legislature and its electors hold the Prime Minister to account. Hooghe and Marks (2009, p. 5) argue that prior to 1991, EU politics occupied a period of permissive consensus in which negotiated “deals” were “cut by insulated elites” and “public opinion

was quiescent”. After 1991, EU contemporary politics is occupied by a “constraining dissensus” in which party leaders must look to public opinion when negotiating European issues and where referendums have “shifted the initiative to citizens and single-issue groups, and “disarm party elites” (Hooghe and Marks, 2009, p. 20; see also Geddes, 2016; De Wilde, 2012; Franklin et al., 1994). The assumption that Prime Ministerial executives are constrained through government under EU membership relies upon the dissensus by some public groups and particularly from predominantly, government-aligned backbench MPs. The dissensus in the UK-EU context and the role of parties in Parliament, rather than exercised from the viewpoint of the Prime Minister’s executive, affirms (not denies) the political disagreement between the executive, the legislature and the electorate which support parliamentary sovereignty. The exercise of parliamentary sovereignty is now dependent upon the Prime Minister’s broad accountability to Parliament and the electorate over all EU negotiations. The Prime Minister’s failure to recognise the dissensus would undermine the accountability of executive policy to the legislature and the electorate and therefore the exercise of parliamentary sovereignty.

Parliamentary sovereignty and the contemporary resettling of parliamentary power under EU membership: the principle of leaving the EU under the 2016 EU referendum

In understanding the resettling of the Parliament’s power in deciding the UK’s relationship to the EU through its referendum in June 2016, it is crucial to recognise the referendum not as an instance of popular sovereignty but as a discretionary exercise of Parliament’s outsourcing of its own essential decision-making capacity (to Remain or Leave). Before the referendum itself, David Cameron’s renegotiation, without sufficiently consulting Parliament on preparing the settlement, demonstrated a crucial demotion of Parliament to the executive which can be understood as a Prime Ministerial-led exercise in permissive consensus (Hooghe and Marks, 2009, p. 5). It generated the claim of a final, non-contestable package but which lacked parliamentary and public legitimacy before and during the referendum.

David Cameron’s Prime Ministerial-led renegotiation ahead of the EU referendum is, to a large degree, bound by those broader EU rules which provide for a constitutional elevation of the Prime Ministerial-led executive through its fusion with EU governmental machinery. Those rules are grounded in the Prime Minister, with other heads of government and respective Presidents of the European Council and Commission

interacting to make decisions at the highest political level in the European Council (Kassim, 2016a). The legislature has no comparable connection to that of the Prime Ministerial-led executive within European Council-level institutional decision-making. The high-level UK-EU negotiation ahead of the referendum took place between David Cameron, as UK Prime Minister, and the European Council President Donald Tusk after months of negotiations between their officials. Parliament had no effective place in taking the ultimate decision on the renegotiation.

The removal of Parliament's ultimate decision-making power over political decisions prohibits it from building a bridge with the executive agreeing to the 'best deal for the UK' (i.e. the permissive consensus) at a level defined by less open decision-making at the EU-level which is far removed from Westminster's accountability, votes on the floor of the House of Commons, oversight, scrutiny or revision of those policies/laws. It is not so much an "information gap" between executive and the parliamentary rank-and-file, as Raunio and Hix (2000) describe but a broader legislative-executive gap of legitimacy. The party MPs in Parliament seek to bridge the 'information gap' which might better be referred to as the legitimacy or accountability gap.

Parliament's subsequent and parallel task in legislating for a Referendum Act became an indirect reclaiming of its sovereignty because the referendum is, on Dicey's terms, a formal recognition that the enactment/repeal of UK's laws and position depends upon the consent of the nationally, represented electorate (Dicey, 1911; Qvortrup, 1999, 2015). By legislating for one, Parliament remedies their own and their voters' acquiescence to a demotion under an executive policy which accumulatively developed under EU membership.

The referendum aftermath, the Supreme Court judgement, the Bill triggering Article 50 and the Repeal Bill, repealing the European Communities Act, affirm both:

- (i) an adaptation of Bogdanor's (2009a) assumption, whereby a referendum becomes an essential complement (not a substitute of) parliamentary votes and legislation to exercise ultimate parliamentary decision-making over the UK's EU relationship;
- (ii) the Supreme Court in *Miller* [2017] operated as 'guardian' of the constitution and of Parliament's ultimate decision-making power over EU membership, consistent with some aspects of common law

constitutionalism, but ultimately having the effect of putting Parliament centre-stage (Eleftheriadis, 2017).

Further parliamentary scrutiny and the capacity for party competition to exploit the executive-legislative accountability gap in deploying scrutiny in key areas demonstrated that accountability gap could be occupied by the crystallising of cleavages by political parties contesting issues in the political sphere, upon which parliamentary sovereignty, in practice, depends.

Before the referendum: Prime Ministerial EU renegotiation as marginalisation of Parliament's sovereignty

To a broad extent, David Cameron and the European Council President entered those EU-level negotiations in which Parliament had little effective place in taking the ultimate decision on the renegotiation, only because they were committed to those EU rules. The UK and the other member states of the European Council set the EU's general political direction and priorities. As an institution, the European Council:

- Enables the UK's participation in the agenda-setting, Treaty-making, non-law-making meetings, or summits, where the UK and all other EU 27 leaders meet to decide by consensus (except where the Treaties provide otherwise via unanimity or qualified majority) on broad political priorities (European Union, 2014).
- Deals with issues that cannot be resolved at the level of intergovernmental cooperation through supranational means.
- "...functions as the principal agenda-setter, the ultimate arbiter in decision-making, and the motor behind European integration" (van de Steeg, 2010, p. 118).
- "...steers the EU" towards achieving EU presidency goals (Miller and Clark, 2014, p. 6).
- Tends to provide political leadership on all EU affairs (de Schoutheete, 2012).
- Determines treaty reform and in all circumstances, the trigger for treaty revision is by unanimous decision of the European Council – a unanimity which necessarily depends upon the UK's consent.
- Is followed after its meetings, domestically, by the UK Prime Minister specifically giving an oral statement reporting back to the House of Commons on European

Council meetings (both *ex ante* and *ex post*), but debates on the meetings are rare (Auel and Raunio, 2014, p. 20).

The negotiations led by David Cameron for the UK had been determined and conducted on the footing of Prime Ministerial power, without intervention of statute – the settlement was not written into UK law (see Lang et al., 2016). Such a move was visible to both parliamentarians and prospective referendum voters, who reflected that in its negative view of his overall negotiated package (Stone, 2016; Vote Leave, 2016). In hindsight, the renegotiated proposals were unconvincing and unpersuasive to many during the referendum and as a result only marginal debates in the referendum focused on the supposed new settlement (Begg, 2016, p. 30; Curtice, 2017a). It specifically left a “reform-shaped hole in the case for Remain...” (Mosbacher and Wiseman, 2016, p. 76). It was of major political significance to the executive-legislative fracture that the day the David Cameron made a statement at the steps of 10 Downing Street, following his Cabinet meeting on the renegotiated settlement and calling the referendum date, six of his own Cabinet members, within moments, announced their support for ‘Vote Leave’ (Cameron, 2016b; Wilkinson, 2016). This had been made possible by the Prime Minister’s relaxing of collective Cabinet responsibility. Most Cabinet ministers, the majority of Westminster MPs as a whole, most industry leaders and trade associations and trade unions favoured the ‘Remain’ position on the referendum campaign trail in order to convince voters for the UK to remain within the EU, but scant details were ever given of the Prime Minister’s renegotiated deal.

It is highly relevant also that David Cameron’s settlement on ‘sovereignty’ unconvincingly specified that the UK will not be committed to further political integration in the EU and the concept of “ever closer union” will not apply to the UK. However, EU parliamentary scrutiny in the Commons held it “...does not and cannot change the Treaty” and some considered it to be “largely symbolic and of limited legal importance” (European Scrutiny Committee, 2016). The underwhelming renegotiation outcome on sovereignty measures, coupled with David Cameron’s lacklustre performance in negotiations over sovereignty and immigration issues, all amounted to inflexibility and non-negotiability in relation to the question on the ballot paper for many prospective referendum voters, Leave or Remain. The Prime Minister’s negotiations in 2015-16 entirely marginalised parliamentary power to decide on EU rules/membership in his renegotiations with Donald Tusk and in bilateral meetings with the other 27 EU leaders; and Parliament, by legislating to outsource a decision to the people themselves by referendum, itself symbolised a

wresting back of control. It corresponded neatly with the leave ‘Vote Leave and take back control’ referendum campaign mantra, which launched its ministerial campaign only moments after Cameron presented his final package (Dearden, 2016; Wilkinson, 2016).

The renegotiated settlement for the UK within the EU was not produced in consultation with Parliament or its parties. However, it did not wholly reject the expectations of the political constitutionalist tradition because the Prime Ministerial-led agreement was still subject to accountability to parliament. The House of Commons went on to scrutinise his settlement on 3rd and 22nd February over the content of that agreement (House of Commons, 2016b; House of Commons, 2016c; Cameron, 2016c) but more importantly, it fell to the judgement of the people in the broad, sphere of contestation in the referendum itself. Parliament had attempted to act accountably over the Prime Ministerial agreement – through critical Select Committee reports and responding to his post-European Council statements in the House of Commons – but ultimately it was resigned to the renegotiated settlement forming the muddled basis for the ‘Remain’ position in the referendum campaign. Although Cameron’s negotiation features “were not major reforms”, he declared nonetheless that they were sufficient to justify recommending that Britain remain as a member of the EU (Ford and Goodwin, 2017, p. 23).

The Prime Ministerial-legislative chasm in the negotiation was mirrored if not exacerbated by the Prime Ministerial negotiation-elector divide. The British public were not confident of David Cameron’s deal for Britain in his EU renegotiations, which he had referred to at the time as the “strongest package ever”. One snap poll conducted by Sky News found 69 per cent of people thought the deal was “bad for Britain” while only 31 per cent said it was “good for Britain” (Stone, 2016). Later polling indicated that only 13 per cent thought it was a ‘good deal for the country’, 42 per cent thought it was a ‘poor deal’ while 45 per cent said they don’t know, highlighting a lack of understanding amongst the public of what the deal actually meant for Britain (Evening Standard/BMG Research Poll, 2016). This strongly suggests there were a high proportion of both those who thought it was a poor deal and those who did not understand the negotiated package only days before the official referendum campaign began. Alongside factors such as the neutrality of the referendum question, the Prime Minister and Conservative-in-Government’s tenure and the high turnout all tilted towards a structural referendum advantage for the Leave vote (Qvortrup, 2016, p. 67), so also did the unpopular Prime Ministerial negotiation.

David Cameron’s Prime Ministerial-led renegotiation preceding the EU referendum provided significant evidence of an executive-legislature and executive-elector relationship

accountability breakdown impacting upon the majority vote to leave. The renegotiation was fundamental to most Leave voters. In particular, there had been a substantial growth in those sceptical and who wanted to see EU powers reduced (The British Election Study, 2016; Geddes, 2016), well beyond those who directly supported simply leaving. By 2015, two thirds opposed the UK's existing relationship with the EU, with only 22 per cent saying we should leave yet 43 per cent wanting a reduction in EU powers (Swales, 2016, p. 5). The proportion of electors as a whole who were waiting on a form of 'fundamental renegotiation' was significant. Those seeking a reduction in EU powers, despite having a Remain orientation, were clearly unconvinced by the renegotiation. A renegotiation which had been determined outside any contested, popular or parliamentary sphere, or beyond a political sphere of public accountability, did not resonate with electors seeking renegotiation. The referendum environment for a large portion of voters gave Leave an electoral advantage because the Leave choice and campaign gave those voters the opportunity to vote for a reoriented Government and Parliament to take control of freedom of movement from EU decision-making bodies who viewed such policies as inflexible, non-negotiable and indisputable EU commitments. The renegotiation had disentangled its proceedings from contemporary modes of political representation. The Prime Minister had marginalised the collective parliamentary status by which Parliament acts as a deliberative assembly in having its say on 'the deal'. Furthermore, no political party itself as a whole had been involved in negotiations to the point it could form a sufficient and informed constitutional link between executive and parliament in the claimed representative interest of electors.

At the presentation of the final package, the referendum had already been enacted so, to a large degree, it affirmed Bogdanor's beginning principle: that the UK-EU negotiation issue could not be resolved through the ordinary, working of the party system. More importantly, it resurrects Bogdanor's legitimacy question where a referendum becomes necessary on an issue of fundamental importance because the parliamentary vote is insufficient to ensure legitimacy (Bogdanor 2009a, p. 185). There had been no parliamentary vote on the deal. There had been no genuine, parliamentary consultation, merely presented as a 'take it or leave it' package. It was led by (Prime) ministerial agreement. The (re)negotiation was insufficient to ensure legitimacy. Yet, unlike Bogdanor (2009a), it is evident that parliamentary sovereignty rests upon the capacity for the political realm of contestation to express the ongoing disagreement about substantive outcomes that society should achieve – Leave or renegotiated Remain – through the recognised legitimate and effective process for electors at resolving these disagreements, which began and ended

with Parliament legislating for public choice and implementing the majority's wishes. In many respects, this conforms with the earlier reinterpretation of Qvortrup (2015) – that the Prime Minister thought the referendum would cement a high-level renegotiation; for most others, including the parliamentary vote and public, the referendum he had offered knowingly had to bypass the legislature's impasse over the European issue.

Parliament's resettling of its sovereignty: legislating for a referendum through the European Union Referendum Act 2015

Parliament's act of legislating for a popular EU referendum through the European Union Referendum Act 2015 was an equally important mechanism in the exercise of its ultimate decision-making power. Despite 479 of 650 MPs eventually favouring Remain in the referendum itself (Menon, 2016), the legislative Act was by its very nature a statute asserting Parliament's ability to outsource its ultimate decision-making power by 544 to 53 MP votes (at second reading) and which addressed a vast swathe of public concerns, not simply leaving the EU. In that trial, Parliament became judge (of the Act) and executioner (of the result) in which people acted as jury. The emphasis placed upon the UK resettling its sovereignty by those who eventually voted to Leave, as they waited for David Cameron's renegotiation to deliver a reduction in EU powers, was central.

A significant part of resolving the contested European issue was an attempt to find some form of political settlement. MPs knew from their own constituents, from external campaigns and the UKIP threat how deeply contested the issues were in the political realm. Those concerns had not been historically addressed, they generated uncertainty and required political settlement. On the second reading of the Bill, the then Foreign Secretary (Philip Hammond) referred to the need for settlement and the then Shadow Foreign Secretary (Hilary Benn) on the urgency to make a decision to address the 'uncertainty in Britain's place in Europe' (House of Commons, 2015). Parliament enacted the referendum law in the UK political system to provide for valid political settlement on that matter. It acts in reference to historical constitutional form six and eight, guiding as precedents in the creation of the 2016 referendum, because Parliament's legitimate exercise of ultimate decision-making power depends upon consent. That is Members of Parliament sought to collectively represent electors through the European Union Referendum Act 2015 and yet where governing at the helm is frequently dependent upon Parliament ruling through external agencies, commissions or bodies, the EU and national referendums.

Difficulties in interpretation are obvious in that referendums are irregular under the constitution and they are ‘advisory’ by law and legislation, yet seriously and very much instructive by nature of UK electoral politics – never once ignored, with all results implemented – and their triggering occurs only by the action of Government in Parliament. But Bogdanor’s (2009a) analysis of public power on the EC/EU need not be overstated. Qvortrup’s (2015) claims that referendum works as an additive to representative government, not a compartmentalised aspect of the constitution seem more appropriate. The people’s final result of 23rd June is still triggered and returned for resolution and implementation by the Government-in-Parliament. The process in which a referendum, by its triggering and its consequential impact on Government policy implementing the result affirms, not denies, parliamentary sovereignty (contra Mabbett, 2017, p. 169; McKibbin, 2017, p. 385).

In making that claim, however, is also to affirm that the rule enabling parliamentary enactment, as Allan (2013) and the common law constitutionalist school argue, serves deeper principles of political and public morality – and that the fundamental rule takes its meaning from the underlying political theory to which it belongs. Parliamentary sovereignty relies upon Dicey’s broad terms that the referendum provides formal recognition that the enactment of laws depends on the consent of the nationally, represented electorate (Dicey, 1911). Yet, the rule of the recognised helm does exist, justified by its past, justifying historical precedents which determine its form – through political representation and Parliament ruling through external institutions, such as referendums, to provide law and further resettlement on the European issue.

Voters on 23rd June 2016: directly tasking Parliament to resettle its ultimate decision-making powers to ‘leave the EU’

Electors on 23rd June 2016 directly tasked Parliament to resettle its ultimate decision-making powers to implement the majority decision to ‘leave the EU’. Neither Cameron, nor most MPs, nor the leading Remain or Leave campaign opinion, nor the opinion polls, precisely predicted a ‘leave’ result. The result had been “...larger than any of the late polling had expected” (Ford and Goodwin, 2017, p. 25). But by nature of the referendum result, the majority of electors tasked Parliament to implement their decision. The subsequent Prime Minister, Theresa May, despite being a low key Remain participant in

the referendum, subsequently pledged to implement the result and has officially pursued an Article 50 policy and pledges to leave the single market, end the jurisdiction of the ECJ and repeal the European Communities Act, consistent with doing so (May, 2017a; May, 2017b). The ultimate decision-making power of Parliament on its EU relationship defers to Westminster's collective and tribal capacity to represent electors. Electors directly tasked Parliament to thereby resettle that ultimate power by nature of the referendum's majority verdict. The 'Remain-majority' Parliament on the whole reoriented their position towards the majority verdict because of Parliament's primary instinct to collectively represent electors.

It is after the electors have spoken and Parliament is instructed that the then secondary role of post-referendum party competition (De Vries, 2009), jockeying between one another to realign executive as against legislative positions, enables decision-making in Parliament to then be exercised. In that internal sphere of the party competition, it is the party political realm which creates positions, concentrated around the terms of 'leaving the EU' in which there are no holds barred – on Article 50 negotiations, the single market, on repealing the European Communities Act 1972 or the transposition of EU law into UK law, on passing the 'final deal', wholesale blocking of Treaty ratification, voting over immigration legislation, holding of a second referendum or another election (Bogdanor, 2017; Miller et al., 2017; Renwick, 2017a; Caird, 2017). Enabling ordinary, parliamentary politics in this sense permits the competition between the separate arms of government and their interests to moderate the risk of one (namely, the Prime Minister) dominating the other (the House of Commons) (consistent with Bellamy, 2007).

As MPs, the majority of Conservatives mostly respected and accepted the result. Very few frustrated Remain participant Conservative MPs have rebelled against their own Government's position on Article 50 notification and the Article 50 Bill. Labour is divided, claiming it *respects* the majority decision but seeks deeper parliamentary scrutiny rights over the terms of exit and some of its MPs do not *accept* the result – 47 Labour MPs, including 10 Shadow ministers, voted against Jeremy Corbyn's instruction to vote for the Article 50 Bill (Chaplain, 2017). Again, 49 Labour MPs backed an amendment to the Queen's speech, requiring the UK to stay in the single market and customs union (Stone, 2017). MPs voted through the Article 50 Bill at Second Reading by 498 to 114 (House of Commons, 2017a; BBC News, 2017a). The separatist SNP wholeheartedly rejects the decision, as it rejected the Referendum Act itself but more importantly, as it rejects the collective representation at Westminster. The Scottish and Welsh assemblies do not

wholeheartedly accept implementing the result and Westminster MPs from those devolved regions are expected to be critical of the implementation of leaving the single market. One minor opposition party did not reconcile with the result because of its wish to represent the referendum's minority supporters (Liberal Democrats; see Goodwin, 2016), along with a larger, Scottish nationalist, opposition party which believed purely in the representation of a devolved part of the UK which felt mandated to Remain (SNP; see Hunt and Keating, 2016). The Brexit process will have political and institutional implications for the external affairs of the devolved administrations of Scotland, Wales and Northern Ireland, as a consequence of the devolution of power that has taken place within the UK since it joined the EU (Whitman, 2017).

Despite internal division in the Labour Party on the issue, the House of Commons nonetheless asserted its authority by holding a vote to call on the Government to invoke Article 50 by 31 March 2017 on the basis of a Labour Motion. The Motion passed by 448 to 75 claimed to "respect" the decision of the British people to leave the EU (House of Commons, 2016a), and successfully secured the release and scrutiny of the Government's plan. The legitimacy of that vote rested upon Parliament's exercise of ultimate decision-making power which depended upon Members of Parliament who collectively represent electors in the deliberative assembly. It committed MPs no further than providing the basis for the ability for Government to enter EU-level negotiations based on the referendum result at that stage, while providing broad scope for reviewing the terms of leaving the EU.

While competitive party jockeying and realignment enabled the executive-legislature chasm to be filled, as might be expected in adapting Burke's assumption, the reasons were founded on directly enhancing their party position vis-a-vis Parliament's political representative role. Labour remained "in disarray" (Menon, 2016; Curtice, 2017c, p. 13) as two thirds of its voters voted Remain yet 70 per cent of Labour constituencies voted Leave, many by wide margins (Gamble, 2017). The result disoriented the party itself but they found a strategy in scrutiny of Government negotiations and amendments to statutes reflecting more favourable terms upon which the UK leaves the EU. Scrutiny formed a practical, parliamentary link, but required party competition and votes to be held, or even cross-party support, which had the potential to form a political mandate for the Prime Minister and the Government. The Conservatives as a party were strikingly quick to reorient toward the referendum result itself and thereby implementing the majority verdict (Menon, 2016; Curtice, 2017c, p. 13), but it chose to do so through fast-track prerogative-led negotiation that only exacerbated the executive-legislature rupture and which, in the

spirit of David Cameron's renegotiation, had been defined under EU membership. In electoral terms, whereas Labour embraced the social liberal values of its Remain voters but nearly 70 per cent of Labour seats voted for Brexit, Conservatives had also put at risk the support of liberal, Remain-voting Conservatives (Ford and Goodwin, 2017, p. 27; Goodwin, 2016). While no straightforward party partisan realignment took place after the referendum, the British Election Study data suggested the Leave/Remain option had a potential role to play in future British elections (British Election Study, 2016). The subsequent election in 2017 put Parliament in a stronger position to exert scrutiny over the Government's Brexit negotiations (Cygan, 2017, p. 18) and with nine tenths of elected MPs in the House of Commons to have pledged their party's position of respecting the referendum result (Rose, 2017).

As sovereignty depends upon parliament which depends upon parties to act as representatives between executive and legislative powers, the enhanced party-electoral convergence over EU-leaving and restricting immigration through party realignment brought about by the referendum verdict may have the potential to bridge the executive-legislature relationship. The referendum choices are crystallised in the party system at the point of the referendum around the most salient political issues such as EU-leaving, self-government, restricted immigration or preserving economic trading relationships, on which voters and successful parties align their issue preferences. Yet, simply because the referendum has a crystallising effect on salient issues can hardly be said to undermine representative government (consistent with Qvortrup, 2015, p. 7), or parliamentary sovereignty.

Parliament's decision-making power by implementing policy in pursuit of the result of the 2016 EU referendum itself was itself elevated but through the interpretations of common law judges in the Supreme Court (*Miller*). Throughout the High Court proceedings (*Miller* [2016]) and the subsequent Supreme Court appeal (*Miller* [2017]; Supreme Court, 2017), the Government maintained it did not need to consult Parliament formally through a vote on legislation, so the judgement gave Parliament a centrality in the political decision-making process (Eleftheriadis, 2017). The Supreme Court primarily held that an Act of Parliament is required to authorise ministers to give Notice of the decision of the UK to withdraw from the EU under Article 50. Ministers could not solely authorise the decision themselves. The UK constitution required such a fundamental change to be effected by Parliamentary legislation (*Miller* [2017], 82). It also judged that the decision to withdraw is reserved to the UK Government and Westminster Parliament, not to the

devolved institutions, and that the devolved legislatures did not therefore “have a veto” on the UK’s decision (*Miller* [2017], 136-151).

The ruling also affirmed a greatly enhanced role of the judiciary in respect of adjudicating over ministerial power and parliamentary power in leaving the EU. It confirmed some aspects of common law constitutionalism in that the Supreme Court very much acted as guardian of the constitution, in which the “UK’s constitutional requirements”, being a matter of domestic law, “should be determined by UK judges” (Supreme Court, 2017). Despite the Court’s dissenting judges in *Miller* wishing for the Court to leave it to the political sphere to constrain executive power and the claims of Parliament (McHarg, 2017), the ruling put Parliament centre-stage of defining the UK-EU relationship including the relevant constitutional issues (Eleftheriadis, 2017) and the UK’s constitutional resettlement, if not the Supreme Court as guardian of their role in making political decisions. The ruling by implication began to debunk the myth of executive authority over Parliament to find the “best deal” and that the “best deal” required making political decisions in Parliament (Eeckhout, 2017).

House of Commons resettling of its sovereignty: triggering the Article 50 negotiations

More significant to Parliament’s substantive power was the passing of the formal European Union (Notification of Withdrawal) Bill formally affirming the Government’s triggering of Article 50, despite Government needing the Supreme Court to tell it to enact legislation in Parliament. The intervention of the court led to a Bill being presented by the Secretary of State, David Davis in the House of Commons – the European Union (Notification of Withdrawal) Bill – within two days of the Supreme Court judgement to empower the Prime Minister to notify the EU of the UK’s intention to withdraw from the EU. MPs voted the Bill through the House of Commons by a majority of 384 (498 votes to 114), to allow Theresa May to begin Article 50 negotiations (BBC News, 2017a). The cleavage in the party system has been crystallised at the point of the Referendum leave result only, in which voters indirectly tasked parliamentary parties, as collective representatives, to align their issue preferences to a nuanced/conditional leave majority, as against their older preferences towards continued EU integration. Through the referendum aftermath, the Supreme Court ruling in *Miller*, the Bill triggering Article 50 and the Bill repealing the European Communities Act, Parliament has eventually provided the essential ingredient of

legitimacy in exercising ultimate decision-making power. It is a remarkable adaptation of Bogdanor's assumption: whereas Bogdanor (2009a) established that a referendum is important where the parliamentary vote is insufficient, the practice after the referendum and the *Miller* ruling is that a referendum is essentially *complementary* to the preceding and implementing parliamentary votes and legislation. That resettling surely confirms that referendums are additive, not substitutive, of the legitimacy (contra Wellings and Vines, 2016; Bodgdanor, 2009; Bodgdanor, 2016b), which predicates parliamentary sovereignty.

Conclusion

The narrative of the UK's commitment to leaving the EU and Parliament's resettling within that decision-making process is unfinished. Parliament's ultimate decision-making power on the UK-EU relationship remains dependent upon effective all-party scrutiny of proposals, legislation, events and the capacity for party competition to exploit the executive-legislative accountability gap in the deployment of scrutiny. The MPs' and peers' intense engagement in questions, debates, and statements and through Select Committees championed Parliament's inherent 'scrutiny reserve' and voting rights over renegotiation aims and outcomes, including alternative trade deals/arrangements (Renwick, 2017a, p. 2). The newly established Exiting the European Union Committee (tasked with examining the Department for Exiting the EU), combined with the International Trade Committee (tasked with examining the Department for International Trade) began to fulfil this role, in addition to the existing European Committees in the House of Commons and Lords (EU Committee, 2016a). It adds to Raunio and Hix' (2000) thesis that backbench parliamentarians work to redress the gap between Government and Parliament on EU policies (Winzen, 2012; Raunio and Hix, 2000, p. 163). By the end of January 2017, 44 Committee Brexit-related inquiries had been launched by 28 different committees across Parliament (UK Parliament, 2017; Renwick, 2017a, p. 21).

In the Commons, the Exiting the European Union Committee, chaired by Labour MP Hilary Benn, and wider parliamentary scrutiny in the Lords and Commons over the Government's plan for Brexit has "already induced multiple concessions" from the government (Renwick, 2017a, p. 2), including:

- requiring the government to prepare a White Paper on its negotiating plan ahead of triggering Article 50 (Exiting the European Union Committee, 2017; BBC News, 2017b);

- committing to giving MPs a proper vote on the final withdrawal agreement, which Theresa May effectively committed to in the following days (May, 2017a).
- requiring the government's negotiating plan to outline its position in relation to membership of the single market and the customs union, which, again the Prime Minister broadly responded to by insisting it did not seek membership of the single market but would seek to renegotiate an alternative relationship to the customs union (May, 2017a, 2017b; Department for Exiting the European Union, 2017).
- the government making it their "first priority" in negotiations to reach agreement on safeguarding the residency rights of 3.2 million EU citizens who are already living in Britain (Hawkins, 2017), and the rights of 1.2 British nationals in the other member states (Secretary of State for the Home Department, 2017; Newson 2017; May, 2017a; May, 2017b; McGuinness, 2017) before and after triggering Article 50, following persistent scrutiny by Select Committees (see Joint Committee on Human Rights, 2016), Labour (BBC News, 2016a), SNP, the LibDems (House of Commons, 2016d) and her fellow Conservative MPs, settling their residency rights position.

The absorption of scrutiny into Labour and SNP party competition on the floor of the House has produced notable results, albeit without direct constraints upon the Prime Minister. While the scrutineers were not able to directly mandate the Government preceding Article 50 negotiations, as Benz (2004) concurs, their vigorous supply of policy and legislative views directly impacted upon, moderated, conditioned and nuanced the Government's delivery of the terms by which the UK might leave the EU.

Parliament and the Exiting the European Union Committee will have a central place in passing or amending the Repeal Bill for the day the UK officially leaves the EU. The legislation aimed to repeal the European Communities Act 1972 – bringing to an end supremacy of EU law over UK law – and to ensure that, wherever possible, the same rules and laws would apply the day after UK's exit as they did before (May, 2017a). The Repeal Bill will also contain delegated powers enabling Ministers to make changes to the statute book to give effect to the outcome of the withdrawal negotiations (Caird, 2017, p. 6), which will receive intense scrutiny, if not opposition by leading Opposition parties. MPs broadly voted in favour of the government's Repeal Bill at its second reading by 326 votes to 290 (House of Commons, 2017b). In that vote, most Labour MPs, as well as LibDem and SNP MPs voted against the legislation – opposing and scrutinising the Bill's "power grab" Henry VIII provisions which it argued gave ministers broad powers to

make legislative changes (rather than Parliament) to address the problems arising out of the UK leaving the EU. Through party competition, Labour had begun to reorient its Brexit policy away from both the referendum result and the Conservative Government's agenda and towards UK membership of the EU single market and the customs union for a transitional period. If *Miller* [2017] taught the Government anything, it is that agreement by ministerial power in altering EU law or membership is absent of legitimacy, accountability and consent, whereby the agreement by Parliament and statute is not.

However the Government chooses to progress, new realignments in the party system will continue to crystallise during the Article 50 negotiations, and during the scrutiny of the Repeal Bill, or over the final agreement, in which voters might retask parliamentary parties to align, resonate or review their EU, immigration or trading preferences. For example, the intervening snap General Election in 2017 called by the Conservative Prime Minister to strengthen her party's majority in Parliament and provide it with a stronger Brexit mandate in the Article 50 negotiations had the unintended effect of creating greater uncertainty (Cygan, 2017). It produced a hung Parliament with a minority Conservative government with the implication that they presented in a weaker position at the commencement of Brexit negotiations which immediately followed the election (Cygan, 2017, p. 18; see also Ford et al., 2017; Renwick, 2017b). The effect however was for nine tenths of elected parliamentarians to consolidate their party's commitment towards the referendum result (Rose, 2017) and provide consent towards some form of Brexit negotiation – with some divisions still remaining on retaining the single market and customs union. A further consequence was the amplified power of accountability influence and scrutiny of Parliament over the Brexit negotiating policy of the Conservative Government of the day (Cygan, 2017, p. 18), left with only a wafer-thin parliamentary majority of 13, maintained by a Conservative-Democratic Unionist Party agreement.

The overall view presented in this chapter first indicates that David Cameron's renegotiation preceding the EU referendum, without consulting Parliament, demonstrated a demotion of Parliament to the executive which can be understood as a Prime Ministerial exercise in permissive consensus (Hooghe and Marks, 2009, p. 5; Geddes, 2016; Franklin et al., 1994). It generated the claim of a final, non-contestable package but which lacked public legitimacy during the referendum. Second, Parliament's parallel task in legislating for a Referendum Act became an indirect resettling of its sovereignty because the referendum is, on Dicey's terms, a formal recognition that the enactment/repeal of UK and EU-derived laws depends upon the consent of the nationally, represented electorate. By

legislating for one, Parliament remedies their own and their voters' choice of demotion under the executive, which has accumulatively developed under EU membership. Third, voters in the referendum on 23rd June directly tasked Parliament to resettle its ultimate decision-making power to implement the majority decision to 'leave the EU'. This tasking of Parliament has had the effect, evidenced by 'Article 50 votes', of creating cleavages in the party system crystallised at the point of the referendum result. Fourth, the referendum aftermath, the Supreme Court judgement in *Miller* and the Bill triggering Article 50 and the Repeal Bill affirm that a referendum becomes an essential complement (not a substitute) of parliamentary votes and legislation to exercise ultimate parliamentary decision-making over the UK's EU relationship. Fifthly, the nature of parliamentary scrutiny and the capacity for party competition to exploit the executive-legislature accountability gap in deploying scrutiny has enabled the partisan sphere of contestation to inhabit the political sphere, upon which parliamentary sovereignty depends. All this suggests a major, if not enhanced role for Parliament in making political decisions and thereby in resettling parliamentary sovereignty. This resettling indicates the holding of a referendum on the UK's membership of the EU has enhanced, not eroded, the principle of representative government and Parliamentary sovereignty (contra McKibbin, 2017, p. 385; Mabbett, 2017, p. 169). After all, after 44 years of EU membership, the UK's withdrawal will mean the Parliament regaining from the EU its centrality of decision-making over key political decisions.

There are clear implications of the approach taken. The view presented of the 'rule of the recognised helm' contrasts with other leading legal and political theories placing popular and legal limitations upon Parliament's sovereignty. The rule of the recognised helm is both a fundamental rule of government and a helm which defines the settlement and resettlement of multiple political actors at the helm. It explains the unsettling and resettling of uncodified relations and conventions between the executive, the legislature, the judiciary and the electorate in their tacit consent/recognition of a rule having the capacity to steer and direct. Other approaches within a popular sovereigntist and common law paradigm have accorded inconsiderable significance and weight to the eight historical constitutional forms defining Parliament's political supremacy, institutional relationships and inter-linkages. By attaching less significance to the eight historical constitutional forms, the gravity of the impact of EU membership on the unsettling of the UK constitution has often been misunderstood if not underestimated.

The identifying of eight innovative developmental, historical constitutional forms enable political and constitutional studies to more widely rethink the shifting and unsettling that occurs between those forms. That experience of a further resettling is particularly relevant to today's understandings of constitutional change. Through the incorporation of the EU at the realigned recognised helm, the sovereignty formed in Parliament incorporates the inter-relationships between the other parts of government but those complex inter-relationships have intensified under EU membership, unsettling the powers at the helm, including the concentration of powers within the helm itself. In the final case study, events since the EU referendum illustrate that Parliament's ultimate power can be further resettled, namely by addressing the historical dilution of its powers.

The thesis has tended more broadly to concentrate therefore on the EU's unsettling of the features belonging to 'What the Crown-*with*-magnates enacts is law' (1200-1350), 'What the Crown-*in*-regulating Parliament enacts is law' (1688-1689), 'What the Crown-*in*-mixed constitutional Parliament enacts is law' (1690-1790s) and 'What the Crown-*through*-Parliamentary political elite with external bodies enacts is law' (1973-present). Potential further study need not be restricted to those constitutional forms, nor the role of the EU itself, but other challenges to parliamentary sovereignty including the growth of the devolved bodies and the introduction of the Supreme Court.

Today, an executive-led Parliament delegates its law-making capacity to other institutions who then impose external control, steerage and direction upon that law, so that those representatives who are elected to the House of Commons by the political community to make law no longer have that practical capacity, since its everyday capacity or competency, but not ultimate right, was voluntarily ceded under the European Communities Act 1972 to navigate the ship of state with a hand on the helm. Parliament retains its ultimate sovereignty because it has the power to terminate or change that membership by repealing or amending the European Communities Act 1972 (Tomkins, 2010) and yet the 44-year practice of choosing not to terminate or change substantial aspects of its Parliament-diminishing EU membership has been said to have left parliamentary sovereignty intact. This final chapter indicates that a sovereignty once shared with the EU does not mean it could not be resettled; to the contrary, it has voluntary and politically shared sovereignty which can be returned if it so chooses.

The constitutional 'unsettling' occurs when new events transgress the rules set out in previous precedented relationships as understood through historical constitutional forms. The EU contributes, with its competitive hand on the helm, to steering and directing the

Government and Parliament, giving it a greater role in navigating state policies. At the recognised helm, successive governments, through Parliaments, have adopted practices which whilst preserving the fundamental rule, are at odds with past historical precedents. This process has led to a fusion of the executive with EU machinery, the dilution of the domestic legislature and the fusion of the elevated judiciary with the Luxembourg court system, which unsettles those historical precedents of parliamentary sovereignty. Parliament can, if it chooses, place a stronger hand at the helm.

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